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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PORTLAND GENERAL ELECTRIC COMPANY,
Petitioner,

v.

MONTANA DEPARTMENT OF REVENUE, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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QUESTIONS PRESENTED

1. May the State of Montana constitutionally impose beneficial-use ad valorem property taxes upon a shareholder-owned utility, whose retail customers are located exclusively outside the State of Montana, for its alleged "use" of federal electric power transmission facilities in Montana when such transmission facilities are owned, operated, maintained, possessed, and controlled exclusively by the Bonneville Power Administration ("BPA"), a federal power marketing agency?

2. May the State of Montana constitutionally impose beneficial-use ad valorem property taxes upon such a utility for its alleged use of federal electric power transmission facilities located in the State of Montana, but at the same time refuse to impose such beneficial-use taxes upon Montana rural electric cooperative utilities that receive indistinguishable transmission services from BPA and whose retail electric customers are all located within Montana?

3. May the State of Montana constitutionally impose beneficial-use ad valorem property taxes on federal electric power transmission facilities of 500kV and over, which high-voltage facilities are designed and operated to transmit large blocks of power in interstate commerce, but at the same time exempt from such taxes lower-voltage federal transmission facilities designed and used to transmit lesser amounts of power over shorter distances?

4. May the State of Montana constitutionally impose beneficial-use ad valorem property taxes upon those it has determined to be users of federal electric power transmission facilities, but at the same time exempt users of property owned by the State of Montana from such beneficial-use taxes?

5. In imposing beneficial-use ad valorem property taxes upon federal transmission facilities, may the State of Montana constitutionally determine the amount of such taxes based upon assumptions (1) that all of the power transmitted flows over taxable high-voltage federal transmission facilities and that, therefore, none flows over tax-exempt lower voltage transmission facilities and (2) that the major value or benefit from the existence of a bidirectional transmission line results from the ability of the line to export power from the state?

PARTIES BELOW

Portland General Electric Company[1] was the only plaintiff below. Defendants below, in addition to the Montana Department of Revenue, were: Mineral County; Billye Ann Bricker, Treasurer of Mineral County; Sanders County; June M. Thayer, Treasurer of Sanders County; and Ed Argenbright, Superintendent of Public Instruction. All of the defendants were represented by counsel for the Montana Department of Revenue.

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[1]PGE is a wholly owned subsidiary of Portland General Corporation, an Oregon corporation. Other wholly owned subsidiaries of Portland General Corporation are Miracle Mine Operations, Inc. and Portland General Holdings, Inc. All of the following enterprises are affiliated with PGE as direct or indirect subsidiaries of Portland General Holdings, Inc.: Portland General Energy Systems, Inc.; Portland General Exchange, Inc.; World Trade Center Northwest Corporation; Portland General Financial Services, Inc.; Columbia-Willamette Development Company; Columbia-Willamette Investment Company; Portland General Leasing, Inc.; Columbia-Willamette Leasing, Inc.; Cornerstone Columbia Development Company; FFP, Inc.; Frontier First Partners; and Rail Leasing, Inc.

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PORTLAND GENERAL ELECTRIC COMPANY,
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v.

MONTANA DEPARTMENT OF REVENUE, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

Portland General Electric Company ("PGE") petitions this Court for a writ of certiorari to the Montana Supreme Court to review the opinion in *Portland General Electric Company v. Montana Department of Revenue*, ___ Mont. ___,773 P.2d 1189 (1989). The opinion is reprinted at 21a of the Appendix.

OPINIONS BELOW

The order of the District Court for Lewis and Clark County, Montana, is unreported and is reprinted at 13a of the Appendix. The opinion of the Montana Supreme Court is reported at ___ Mont. ___, 773 P.2d 1189, and is reprinted at 21a. A related case involving additional utility plaintiffs and different federal 500-kV transmission facilities was also decided by an order of the District Court for Lewis and Clark County, Montana. *See Pacific Power & Light Company v. Montana Department of Revenue*, ___ Mont. ___, 773 P.2d 1176 (1989) *("Pacific Power")*. The order in the *Pacific Power* case is unreported and is reprinted at 29a of the Appendix. All of the evidence received in the *Pacific Power* case was entered into the

record in this proceeding by stipulation approved by the trial court.[2] The trial court's order in the *Pacific Power* case was also appealed to and affirmed by the Montana Supreme Court, which decision is reported at ____ Mont. ____, 773 P.2d 1176, and is reprinted at 51a. A petition for rehearing in that case was timely filed with the Montana Supreme Court, which petition was denied on June 1, 1989.

JURISDICTION

The Opinion of the Montana Supreme Court was issued on May 10, 1989. Petitioner PGE did not petition for rehearing. Under United States Supreme Court Rule 20.2 and 28 U.S.C. § 2101(c) (1982), a petition for certiorari is due on August 8, 1989. Jurisdiction rests on 28 U.S.C. § 1257 (1982), as amended by Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988).

STATEMENT OF THE CASE

A. The Facts.

The basic facts are not in dispute. Congress has directed the Bonneville Power Administration ("BPA") to construct, own, operate, and maintain a major federal electric transmission grid called the Federal Columbia River Transmission System ("FCRTS") to serve several important federal purposes.[3] Those purposes specifically include the integration and transmission of "electric power from existing or additional Federal or non-Federal generating units" located both within and without the Pacific Northwest.[4] Pursuant to this congressional authority, in 1973 BPA constructed, and today BPA operates, maintains and controls, a federal 500-kV transmission line from BPA's Hot Springs substation in northwestern Montana to the Idaho border.

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[2] References to the transcript in the *Pacific Power* case are designated by the word "Incorporated" appearing before the transcript citation. Thus, a citation to transcript page 77 of the *Pacific Power* case would appear in this Petition as "Incorporated Tr. 77." The name of the witness providing the testimony follows the citation.

[3] *See* the Bonneville Project Act, 16 U.S.C. § 832 (1982); the Pacific Northwest Federal Transmission System Act, 16 U.S.C. § 838 (1982).

[4] 16 U.S.C. § 838b (1982).

Many years after BPA's Hot Springs-Idaho border 500-kV transmission facilities were first placed in commercial operation, five Northwest utilities[5] decided to construct and operate Colstrip Units 3 and 4, two new coal-fired steam electric generating plants to be located in southeastern Montana, where the coal was located. Pursuant to congressional authorization, the utilities contracted for BPA to transmit the power from the new Colstrip plants to their service areas to the west. For PGE, BPA delivers power to a substation near Portland, Oregon. Under the BPA transmission contract, PGE has no right to own, operate, maintain, possess, or even have physical access to the transmission facilities for which PGE has been taxed by the State of Montana. Indeed, PGE's nearest personnnel and equipment are more than 300 miles from the transmission line.

B. The Proceedings in State District Court.

The Montana Department of Revenue ("Department of Revenue" or "Department") notified PGE that it was taxing PGE for its alleged use of BPA's Hot Springs-Idaho border 500-kV transmission facilities. PGE challenged that action by filing a lawsuit in the Montana District Court for Lewis and Clark County in Helena. PGE's complaint specified that the Department's imposition of beneficial-use taxes violated, inter alia, the Supremacy Clause, the Commerce Clause, and the fourteenth amendment. In a non-jury trial, three witnesses testified and numerous documents, transcripts, and exhibits were admitted. On January 19, 1988, the District Court issued an order upholding the taxes. *See* 13a of the Appendix.

C. The Montana Supreme Court Decision

PGE timely appealed to the Montana Supreme Court which affirmed. *See* 21a. No petition for rehearing was filed.

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[5]Those utilities are Portland General Electric Company, which serves customers located in Oregon; Pacific Power & Light Company, which serves retail electric customers in six western states; The Washington Water Power Company, which serves retail electric customers in Washington and Idaho; Puget Sound Power & Light Company, which serves retail customers in Washington; and the Montana Power Company, which serves retail customers located in Montana and Yellowstone Park, Wyoming.

REASONS FOR GRANTING THE WRIT

Montana's imposition of beneficial-use taxes upon PGE violates three fundamental federal constitutional provisions — the Supremacy Clause,[6] the Commerce Clause,[7] and the fourteenth amendment. In 1981, this Court upheld a Montana severance tax on coal mined from federal land in Montana and shipped to electric utilities in the Midwest. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (*"Commonwealth Edison"*). Now Montana seeks to further broaden its "tollhouse" taxes. It seeks to tax alleged use by Northwest utilities of federally owned and operated instrumentalities of commerce — BPA's major electric transmission facilities between Hot Springs, Montana and the Idaho border.

While this case involves Commerce Clause issues similar to those considered by this Court in *Commonwealth Edison*, it also involves an effort by Montana to tax the "use" of federal property. If Montana's effort succeeds, the states "may tax the mail; they may tax the mint." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 432 (1819) *("M'Culloch")*. The critical issue here thus arises under the Supremacy Clause: May the states tax alleged use of federal instrumentalities (here, the BPA electric grid; next, perhaps, the interstate highway system)? Is it consistent with the Supremacy Clause for the states to tax an alleged use of a federal instrumentality which was designed and built with federal funds, and which is possessed and controlled exclusively by a federal agency in order to serve a broad federal purpose?

At the outset, this Court should consider two important factors that have influenced this and related litigation over the last five years. Those factors are (1) the immense precedential impact that the challenged Montana Supreme Court decision will have if allowed to stand and (2) the overall circumstances surrounding the litigation in Montana State courts. Each factor strongly supports issuance of the requested writ.

A. Background Factors Supporting Issuance of the Writ.

There are two interrelated background factors that support is-

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[6]Article VI, clause 2 of the United States Constitution.

[7]Article I, section 8, clause 3 of the United States Constitution.

suance of the writ. The first is that the Montana beneficial-use experiment is being watched closely by other states in the Pacific Northwest. For example, measures were introduced in both the 1987 and 1989 Oregon Legislative Assemblies that would have imposed beneficial-use taxes upon federal transmission facilities located in the state. The 1989 measure was forestalled, doubtless in hope that this Court would resolve the serious constitutional questions created by Montana's experiment, saving both Oregon and its potential taxpayers the enormous sums necessary to adjudicate such a controversy. An expansion of Montana-style beneficial-use taxes could have a profound effect upon each utility's operations, its power marketing activities, and ultimately perhaps BPA's own power marketing activities.

The second background factor supporting issuance of the writ involves simple fairness. The issue of whether the State of Montana may tax foreign investor-owned utilities for their alleged use of BPA 500-kV facilities has sparked intense public interest throughout Montana. The most important consideration is economic: If Montana's unprecedented imposition of beneficial-use taxes on federal transmission facilities is not set aside, the many millions of dollars the investor-owned utilities have paid under protest now being held in escrow accounts will be released to the local taxing districts. Understandably, from the earliest days strong sentiments in favor of imposition of the tax have frequently been voiced. *See, e.g.*, Minutes of Montana House Taxation Committee (Mar. 1, 1983).

A common remark often heard in legislative halls is, "The best tax is the one the other guy pays." Normally, the first line of defense against unjust taxation is the ballot box: Persons unfairly targeted by legislators can vote their pocketbooks. That protection, however, is simply not available to PGE nor, for that matter, to most other taxpayers who have paid beneficial-use taxes on federal transmission lines. PGE's customers all reside in Oregon and therefore have no representative in Montana legislative halls, nor can they participate in the elections for Montana's district court and supreme court judges. PGE's complete political disenfranchisement suggests strongly that the writ should be issued. Moreover, this Court is the only federal court available in this matter to protect national in-

terests and the interests of other states' citizens, for the Tax Injunction Act denies PGE access to federal district courts. 28 U.S.C. § 1341 (1982). Finally, the Montana Supreme Court was not entirely unfamiliar with the controversy before it was presented on appeal — Montana Supreme Court Chief Justice Turnage in 1983 was both State Senator Turnage and a member of the 1983 Montana Senate Revenue Committee, which committee reported out the amendments to Mont. Code Ann. § 15-24-1203 that led to imposition of the challenged beneficial-use taxes on PGE. All of these factors suggest that PGE has yet to have its federal constitutional challenges addressed by a neutral body.

B. The Supremacy Clause: Both the Doctrine of Implied Preemption and the Doctrine of Express Preemption Invalidate Montana's Imposition of Beneficial-Use Taxes on Federal High-Voltage Transmission Facilities.

PGE's challenge involves two Supremacy Clause issues, one of "implied preemption" arising under Chief Justice Marshall's historic *M'Culloch* opinion, and the second arising under an express statute designed to prevent discrimination against interstate transmission of electric power, the Anti-Discrimination Act.[5] Each of these Supremacy Clause challenges is discussed below.

1. Under *M'Culloch v. Maryland,* Beneficial-Use Taxes May Not Be Imposed on Account of Federal Property Unless the Taxpayer Possesses and Controls the Facilities Subject to the Tax.

As is established below, the State of Montana has taken an utterly unprecedented approach to state taxation of federal instrumentalities. Neither *M'Culloch* nor the cases decided under it have ever been interpreted to authorize imposition of beneficial-use taxes upon a private party that does not possess the federal facilities upon which the taxes are based. Furthermore, in the instant case PGE is not even allowed physical access to BPA's Hot Springs-Idaho border 500-kV transmission facilities; only BPA operates, maintains, and controls those facilities.

If Montana's imposition of beneficial-use taxes on PGE is allowed

[5] 15 U.S.C. § 391 (1982).

to stand, nothing would prevent a state from taxing a private person for his alleged use of federal postal facilities used to deliver the mail, federal hydroelectric projects that generate power for consumption by industrial and residential users of power, or numerous other federal instrumentalities possessed by the government and employed in providing a vast array of services to citizens of the United States. The raw, uncontested facts establish that Montana's tax is indeed both unique and dangerous.

In *M'Culloch*, Chief Justice Marshall pointed out the mischief that would be caused by state taxation of federal instrumentalities:

> If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.
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> ....The question is, in truth, a question of supremacy; and *if the right of the States to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.*

Id. at 432-33 (emphasis added). Quite simply, instrumentalities actively used by the federal government may not be subjected to state taxation.

PGE does not contend that federal property possessed, occupied, and controlled by a private taxpayer may not be subjected to state property taxation; *see Baltimore Shipbuilding and Dry Dock Co. v. Baltimore*, 195 U.S. 375 (1904) (states may tax private interests in federal property). Still, *M'Culloch's* bright-line distinction remains: States are powerless to tax federal property which is exclusively in the hands of federal officials. Thus, in *Mayo v. United States*, 319 U.S. 441 (1943), this Court upheld an injunction against a state's

enforcement of a statute calling for the regulation and imposition of fees upon fertilizer owned by the Untied States. *Mayo's* significance results from its holding that when the United States itself is carrying on an activity upon which the state attempts to impose a tax, congressional silence is not to be construed as consent to such taxation:

> But where, as here, the governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom [from taxation] continues.

Id. at 448.[9]

During World War II this Court issued a decision in a situation closely analogous to the present one. In *United States v. County of Allegheny*, 322 U.S. 174 (1944) *("Allegheny")*, Justice Jackson first summarized the history of immunity from state taxation:

> But unshaken, rarely questioned, and indeed not questioned in this case, is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation.

Id. at 177. The Court implemented Justice Jackson's rationale by voiding a state tax upon property owned by the United States. However, the Court did note that federal property *in the possession of a private taxpayer* might be subjected to state taxation: "[The taxpayer] is a bailee for mutual benefit. Whether such a right of *possession and use* in view of all the circumstances could be taxed by appropriate proceedings we do not decide." *Id.* at 186 (emphasis added).

Decisions subsequent to *Allegheny* developed the notion that the value of a taxpayer's possessory interest in property could be taxed by the state, so long as there was no attempt to tax the

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[9]In light of *Mayo*, it is interesting to note that in 1980 Montana's congressional delegation attempted but failed to obtain congressional consent to the taxing of BPA high voltage transmission facilities in Montana. Minutes of Montana House Taxation Committee at 3 (Jan. 21, 1981).

federal value. For example, in *United States v. Detroit*, 355 U.S. 466 (1958), this Court upheld a tax upon a lessee of federal property who had both possession and physical use of the federal property. *Id.* at 470. And in *United States v. Muskegon*, 355 U.S. 484 (1958), a state tax upon a permittee who was in actual possession of a manufacturing plant owned by the United States was upheld. *Detroit v. Murray Corporation*, 355 U.S. 489 (1958), further developed the requirement of a possessory interest under the *M'Culloch* line of cases:

> We see no essential difference so far as constitutional tax immunity is concerned between taxing a person *for using property he possesses* and taxing him *for possessing property he uses* when in both instances he uses the property for his own private ends. Nor have we been pointed to anything else which would bar a State from taxing possession in such circumstances. *Lawful possession of property is a valuable right when the possessor can use it for his own personal benefit.*

Id. at 493 (citation omitted; emphasis added).[10]

Lower federal courts have interpreted the *M'Culloch* line of cases to preclude taxation of federal property in analogous situations. Most recently, the Sixth Circuit affirmed a federal district court's determination that a state could not impose property taxes on a contractor who operates and maintains federal munitions facilities. *United States v. Hawkins County, Tennesse*, 859 F.2d 20 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 1638 (1989) And only last

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[10]See Keesling, "Property Taxation of Leases and Other Limited Interests," 47 *Calif. L. Rev.* 470, 487-92 (1959), which indicates that the property tax can be imposed *only if* the taxpayer has both possession and use of the property.

The most recent Court decision in the *M'Culloch* line is *United States v. County of Fresno*, 429 U.S. 452 (1977), in which a California county had imposed an annual tax on private taxpayers' possessory leasehold interests in government-supplied housing. After reviewing recent cases, this Court returned to *M'Culloch's* first principles, *viz.*, that federal functions and interests not be discriminated against. To determine the validity of the tax, this Court looked to three factors: 1) its legal incidence, (2) whether it was applied in a discriminatory manner, and (3) whether it was based on the total value of the federal interest or only the value of the taxpayers' possessory interest in the property. These three issues are addressed in the subsequent portion of this Petition.

year, in *United States v. Jackson County, Missouri,* 696 F.Supp. 479 (W.D. Mo. 1988), the federal district court held that Bendix, which had agreed with the United States government to manage, operate, and maintain a federal munitions facility, could not be taxed for similar alleged use of those facilities. In reaching this holding, the court discussed this Court's 1958 beneficial-use cases, as well as *United States v. County of Fresno,* 429 U.S. 452 (1977), and concluded that because Bendix lacked exclusive possession of the facilities the tax could not validly be imposed under Missouri law.[11].

State court decisions also support the restriction of the state's taxing power to federal property which the taxpayer possesses and occupies. For example, in *Thiokol Chem. Corp. v. Morris County Bd. of Taxation,* 41 N.J. 405, 197 A.2d 176 (1964), the New Jersey Supreme Court voided a tax on federal contractors because their interests did not constitute a lease. While the issue there involved the question of state statutes, the court noted in its opinion, "Of course, property owned and in possession of the United States would not be taxable." *Id.* at 410, 197 A.2d at 181. Finally, in *Cutter Flying Serv., Inc. v. Property Tax Dep't,* 91 N.M. 215, 572 P.2d 943 (1977), the court held that a license to use exempt property does not subject property to taxation.

2. The Anti-Discrimination Act Prohibits Taxes that Even Indirectly Discriminate Against Interstate Commerce in Electricity.

The Montana tax is explicitly preempted by Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. § 391 (1982) ("Anti-Discrimination Act"). Federal law is not just silent, it affirmatively precludes such state taxation. The Anti-Discrimination Act provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against

[11]By no stretch of the imagination can PGE's "use" of the Hot Springs-Idaho border line be deemed "exclusive"; many entities enjoy some benefit from the existence of the Hot Springs-Idaho border line.

> out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

The Anti-Discrimination Act was applied in *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979), in which the unanimous Court invalidated a New Mexico tax upon the privilege of generating electricity within the state because out-of-state electricity users bore a greater burden than in-state users. The Court held, "Because the electrical energy tax *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates the federal statute." *Id.* at 150 (emphasis in original; footnote omitted). Of particular import is the Court's holding that even *indirect* discrimination against out-of-state users is prohibited by the statute:[12] State taxation is invalid under the Anti-Discrimination Act if those located beyond the borders of the taxing state bear, either directly or indirectly, greater burdens than those within the taxing state. Here, the evidence of both direct and indirect discrimination is overwhelming.[13]

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[12]The Nevada Supreme Court also relied upon the Anti-Discrimination Act in declaring invalid a Nevada tax upon power generated at Hoover Dam. *State v. Burbank*, 100 Nev. 598, 691 P.2d 845 (1984).

[13]There is a second "express preemption" basis for invalidating the challenged taxes: The "impact aid" provisions of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. § 839e(m) (1982). That federal statute authorizes BPA to reimburse local taxing districts for all direct economic consequences resulting from construction and operation of new federal high-voltage transmission facilities located within the districts. The impact-aid provisions were enacted as a direct response to Montana's attempt to persuade Congress to allow imposition of taxes directly upon federal transmission facilities. *See* Montana House Taxation Committee Minutes at 3 (Jan. 21, 1981). Congress appears to have intended that the impact-aid provisions would be the sole basis for local taxing districts to derive revenues on account of federal transmission facilities. To date, BPA has paid over $460,000 in impact-aid payments to Montana local taxing districts. Incorporated Tr. 522 (Eskridge). However, because the Hot Springs-Idaho border line was already in operation when the impact-aid provisions were enacted, no impact-aid payments may be made on account of the Hot Springs-Idaho border BPA line.

C. The Commerce Clause: Montana's Beneficial-Use Taxes on Federal Transmission Facilities Discriminate Against Interstate Commerce in Electricity.

The challenged taxes violate the Commerce Clause. Critical to the functioning of the federal system is that states not inflict disproportionate burdens upon interstate commerce. Very recently this Court in a unanimous opinion, *New Energy Co. of Indiana v. Limbach*, ___ U.S. ___, 108 S. Ct. 1803 (1988), emphatically recited the protections afforded by the "negative implications" in the Commerce Clause:

> This "negative" aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.

Id. at ___, 108 S.Ct. at 1807 (footnotes and citations omitted).

In *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) *("Brady")*, this Court reviewed past Commerce Clause decisions and noted that state taxes have been sustained against

> Commerce Clause challenge when the tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.

Id. at 279. It is critical to note that the state must meet *each* of these four criteria; violation of even one criterion will invalidate the challenged tax.

It is difficult to perceive how the tax on PGE can meet the first requirement, nexus. PGE has no taxable relationship at all with the defendant counties. PGE conducts no business activities whatsoever within hundreds of miles of northwestern Montana. It owns no property located there, and none of its many employees reside

there. The *sole* link between PGE and the defendant counties is an electric transmission agreement between PGE and BPA under which BPA employs the entire, undifferentiated FCRTS to transmit power to PGE. The Hot Springs-Idaho border transmission line is only a small part of the FCRTS. These circumstances establish that the tax simply cannot meet *Brady's* nexus requirement.[14]

The unusual basis for imposing taxes in this case also calls into question whether the tax has been fairly apportioned and whether it is fairly related to services the local taxing districts provide to PGE. Aspects of the fair-apportionment and fair-relation criteria are discussed in the context of succeeding portions of this Petition. This leaves the most important criterion, discrimination against interstate commerce.

Perhaps the best introductory statement of the problem of discriminatory taxes under the Commerce Clause is in Professor Hartman's seminal treatise, *Federal Limitations on State and Local Taxation*. Professor Hartman states:

> "Discrimination" is not a self-defining term. It can be a delusively simple term, and once the question goes beyond the tax that is patently discriminatory on its face, much room for controversy about hidden discrimination exists. While purporting to treat local commerce and interstate commerce alike, if the practical operation of the tax gives local business a competitive advantage over interstate business, it will be branded as unconstitutionally discriminatory. In short, a tax may be nondiscriminatory on the face, but the effect may be discriminatory. The [United States Supreme] Court has frequently found it necessary to probe beneath the face of the statute to expose its discriminatory nature and effect.

P. Hartman, *Federal Limitations on State and Local Taxation* § 2:19 at 122-23 (1981). The following portions of this Petition establish (1) that the Montana statutory scheme regarding bene-

[14]The nexus issue also arises under the fourteenth amendment and, accordingly, is discussed in that portion of this Petition also.

ficial-use taxes has been crafted with a clear intent to discriminate against both interstate commerce and those with whom the United States contracts, (2) that the legislative history behind Montana's beneficial-use statute, Mont. Code Ann. § 15-24-1203 (1987), reflects both a realization that there would be discrimination against interstate commerce *and* an intention that such discrimination occur, and (3) that the Montana Department of Revenue has implemented the beneficial-use statute in a manner purposefully discriminatory against interstate commerce.

1. The Montana Statutory Scheme Discriminates Against Interstate Commerce.

There are at least four unambiguous provisions in the text of the Montana property tax statutes that establish a clear legislative intent to discriminate against both interstate commerce and those with whom the United States deals. Each of those four instances is discussed below.

a. Limiting the Tax to Transmission Facilities of 500 kV and Higher Discriminates Against Interstate Commerce.

Montana's discrimination against interstate commerce is manifest in the very text of the 1983 statutory amendment authorizing taxation of BPA transmission facilities. That amendment provides:

> The tax shall be imposed upon the possession or other beneficial use of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax.

Understanding the significance of Montana's limitation to 500-kV transmission facilities requires a brief digression into electric power transmission theory and practice.

First, regardless of intentions or human agreements, power will flow over a transmission system freely, constrained solely by the laws of physics. It is impossible to specify which generating unit's power is going over a specific line to serve a particular customer or customers. Incorporated Tr. 41-46 (Porter); Plaintiff's Exhibit

21. Moreover, transmission lines are bidirectional, *i.e.*, they can be used to transmit power either direction. Incorporated Tr. 64 (Porter). Thus, the line running between Hot Springs and the Idaho border may carry power from Montana on one day and power into Montana on the next.

Mr. Dennis Porter, BPA's transmission engineering expert, testified that high-voltage transmission lines are employed to transmit power over long distances, while lower voltage lines generally are used for shorter distance transmission and local distribution purposes. It is generally conceded that high-capacity lines include lines of 230 kV and above. Mr. Porter also testified that the highest capacity alternating-current lines in service in the Western United States are 500 kV; those lines are capable of transmitting approximately 4.7 times the power 230-kV lines can transmit. Incorporated Tr. 57 (Porter).

By restricting the tax to the highest of the high-voltage lines — those of 500 kV and over — the Montana Legislature intended to, and did in fact, inflict a disproportionate economic burden on transmission facilities that have the greatest impact upon interstate commerce. The lines singled out for taxation are the arteries of interstate commerce in electricity.

b. Montana's Tax Classification Scheme Establishes and Intent to Discriminate Against Out-of-State Consumers of Electric Power.

The second example of the Montana Legislature's express purpose to discriminate against interstate commerce can easily be seen in several Montana statutes that address classification of property for ad valorem tax purposes. Montana assigns various types of property to different classifications, each classification having a different tax "rate" or percentage of market value. Understanding fully how Montana's property tax classification scheme discriminates against interstate commerce requires some background.

There are basically only two types of electric utilities in the State of Montana, *viz.* investor-owned utilities (such as

PGE) on the one hand and rural electric cooperatives on the other. The vast majority of the customers of investor-owned utilities operating in Montana reside in states other than Montana; PGE, whose entire retail customer base is located in western Oregon, is a prime example. In contrast, the customers of Montana rural electric cooperatives are all located exclusively *within* Montana. In addition, all rural electric cooperatives in western Montana, the area containing the Hot Springs-Idaho border lines, are "preference" customers of BPA, which means that they have preference access for *all* of their power needs from the BPA generation and transmission system, which system includes the Hot Springs-Idaho border lines. With this in mind, it should be clear that, in order to create a disproportionate burden on interstate commerce by exporting local taxes, all the Montana Legislature need do is favor rural electric cooperatives' property in relation to property owned by investor-owned utilities such as PGE. This is precisely what the Montana Legislature accomplishes through its property classification scheme.

One need compare only two property tax classification statutes in order to perceive how Montana has discriminated against interstate commerce. Those two statutes are Mont. Code Ann. § 15-6-135 and Mont. Code Ann. § 15-6-141 (1987). The former statute sets the tax rate for rural electric cooperative property ("class five property") at 3 percent of true cash value, while the latter statute sets the tax rate for investor-owned utility property ("class eleven property") at 12 percent of true cash value. Thus PGE pays *four times* the property taxes that a rural electric cooperative would pay for an *identical* piece of property.

c. The Montana Legislature's Intent to Inflict Disproportionate Economic Burdens on Interstate Commerce on Account of the Federal Transmission Facilities Is Manifest in Its 1981 Amendment to Mont. Code Ann. § 15-6-141.

The third textual example of Montana's discriminatory intent is contained in the Legislature's 1981 amendment to Mont. Code Ann. § 15-6-141, which contains the definition of class eleven property. In light of the Department's explicit admission that Montana rural electric cooperatives do in fact use the BPA transmission system,[15] one must wonder how those rural electric cooperatives have escaped beneficial-use taxation. One possible explanation is in the 1981 amendment to Mont. Code Ann. § 15-6-141(a), set forth below:

> (a) centrally assessed electric power companies' allocations, *including, if congress passes legislation that allows the state to tax property owned by an agency created by congress to transmit or distribute electrical energy, allocations of properties constructed, owned, or operated by a public agency created by the congress to transmit or distribute electric energy produced at privately owned generating facilities (not including rural electric cooperatives).*

Of course, the damning phrase is contained in the parentheses: "(not including rural electric cooperatives)." The discriminatory intent in that phrase becomes all the more apparent when the statutory property classification for Montana rural electric cooperatives is examined; under Mont. Code Ann. § 15-6-135(1)(a) (1987), such property is taxable only if it is "used *and owned by* cooperative rural electrical...associations organized under the laws of Montana...."

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[15] *See* Department of Revenue Brief to Montana Supreme Court at 33-34 (Nov. 10, 1988), discussed *infra*.

(Emphasis added.) In this manner the Legislature has precluded classifying federal property used by Montana rural electric cooperatives as class four property. It is difficult to imagine a more blatant attempt to export taxes!

d. Montana's Exemption of Users of State-Owned Property from Beneficial-Use Taxes Discriminates Against Those With Whom the Federal Government Contracts.

The last sentence of the beneficial-use statute, added in 1987,[16] exempts from beneficial-use taxation any taxpayer who uses *state*-owned railroad property. Specifically, the recent amendment removes beneficial-use taxes from persons or entities who use state-owned railroad tracks and rights-of-way so long as such persons or entitites use the property exclusively for railroad purposes. The record in this case establishes that the exemption was carefully crafted to protect those with whom the state contracts for use of state-owned property. Because the Montana Legislature has provided no similar exemptions for users of federally owned property, the beneficial-use statute runs afoul of this Court's recent decision affirming *United States v. Manassas, Virginia*, 830 F.2d 530 (4th Cir. 1987), *aff'd*, 108 S.Ct. 1568 (1988) *("Manassas")*.

In *Manassas*, Virginia's beneficial-use tax statute had been crafted to exempt from taxation certain property owned by state and local governmental units. Virginia s imposed beneficial-use taxes on a private taxpayer who had admittedly used federal property to perform services for the United States. The taxes were challenged on constitutional grounds, inter alia, that the tax discriminated against those who contract with the federal government.

The court of appeals asserted that the dispositive precendent is *Phillips Chem. Co. v. Dumas Indep. School Dist.*, 361 U.S. 376 (1960) *("Phillips")*, which held that beneficial-use taxes that discriminate against users of federal property are unconstitutional. Based on *Phillips*, the court struck down the Virginia tax because of the exemptions for property owned by state and local governments,

[16]Ch. 591, Montana Laws 1987.

reasoning that the state treated those who use state property better than those who use federal property. 830 F.2d at 534. As noted above, this Court affirmed *Manassas* only last year.

The Montana tax scheme cannot survive under the *Phillips* and *Manassas* analysis. Not only is the amount of tax imposed upon PGE disproportionate to any conceivable alleged use of the Hot Springs-Idaho border facilities (a point established *infra*), but also the beneficial-use tax statute treats those who contract with the federal government worse than those who contract with the state. On this basis alone the Montana beneficial-use statute should be struck down.

In summary, the Montana statutory scheme is infected with at least four separate provisions that reflect a clear intent to discriminate against both interstate commerce and those with whom the federal government deals. The Montana Legislature very recently reinforced this intent by exempting state-owned railroad property from taxation, even though such taxpayers (unlike PGE) may have exclusive use, possession and control of the tax-exempt property. For each of these four reasons, the Montana statutory scheme regarding implementation of beneficial-use taxes is unconstitutional on its face.

2. The Legislative History Behind the 1983 Amendment to Montana's Beneficial-Use Statutes Establishes an Intent to Discriminate Against Out-of-State Consumers of Electric Power.

The legislative history behind the 1983 amendment to Mont. Code Ann. § 15-24-1203 establishes conclusively that the Montana Legislature *intended* to discriminate against interstate commerce by exempting from taxation the lower voltage federal transmission facilities used primarily to serve Montana consumers. For example, in the Minutes of the Meeting of the Montana House Taxation Committee dated March 1, 1983, Representative Marks, the sponsor of the legislation, asserted, "If the privilege tax [on BPA 500-kV lines] is applied, a large amount of that tax would be picked up by consumers outside of the State of Montana." Minutes at 4. After the bill had passed the Montana House, Rep-

resentative Marks presented it to the Senate Revenue Committee, where he introduced the measure by urging that its scope should be restricted to 500-kV facilities. He noted the obvious: "If you get below 500-kV [lines]...you could include smaller lines and REAs [rural electric cooperatives]." Minutes of Montana Senate Taxation Committee at 2 (Mar. 25, 1983). Moreover, the record of the Senate deliberations testifies to a similar desire to discriminate. For example, Senator Towe urged that the bill be passed on the grounds that "other power companies [than Pacific and Montana Power, both of which serve Montana customers] will pay 85% [of the tax] and will pass that cost on to their customers in Washington and Oregon." *Id.*[17] These clear indications of discriminatory intent — a hope to protect local enterprises at the expense of out-of-state consumers — buttress the conclusion that the Montana legislation runs afoul of both the Commerce Clause and the Anti-Discrimination Act.

3. The Beneficial-Use Statute is Being Applied by the Department of Revenue in a Manner that Inflicts Disproportionate Burdens upon Out-of-State Consumers of Electric Power.

The foregoing portions of this Petition establish that Mont. Code Ann. § 15-24-1203 (1987), was designed to discriminate against interstate commerce. For its part, the Department of Revenue has more than merely implemented the legislative purpose; it has applied the legislation in a manner that is almost punitive. Three specific shortcomings in the Department's application of the statute are set forth below.

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[17]Also in the Senate Revenue Committee, Senator Turnage (now Montana Supreme Court Chief Justice Turnage, who voted to uphold the imposition of beneficial-use taxes on PGE), spoke in favor of the measure. Minutes of Senate Taxation Committee at 4 (Mar. 29, 1983).

a. The Department of Revenue Has Failed to Impose Beneficial-Use Taxes upon Montana Rural Electric Cooperatives that the Department Openly Admits "Use" BPA Transmission Facilities.

The first example of the Department's discriminatory implementation of beneficial-use taxes is that the Department has yet to impose any beneficial-use taxes on Montana rural electric cooperatives, notwithstanding that the Department is concession that such preference customers do in fact use the Montana BPA transmission system. Department of Revenue Brief to Montana Supreme Court at 33-34 (Nov. 10, 1988). Nothing in the text of Mont. Code Ann. § 15-24-1203 (1987), limits the scope of the statute for 500-kV transmission-line taxes to investor-owned utilities; nonetheless, the Department has targeted *only* such utilities — to the exclusion of Montana rural electric cooperatives.

The record establishes that Montana rural electric cooperatives benefit from the existence of the FCRTS. For example, Mr. Porter of BPA stated that power delivered to Montana REA preference customers is scheduled across the entire BPA system, which of course includes the Hot Springs-Idaho border facilities. Incorporated Tr. 190-91. And BPA's Montana representative, George Eskridge, testified that power from the Columbia River power system would come over a variety of paths, including the Hot Springs-Idaho border 500-kV system. Incorporated Tr. 491. Indeed, in BPA contracts for provision of that power, Hot Springs is one of only three locations for further delivery to Montana preference customers. Mr. Eskridge further testified that power arriving at Hot Springs for consumption in Montana would necessarily have come over the 500-kV facilities. Incorporated Tr. 492.

In spite of many clear indications that Montana rural electric cooperatives derive significant benefit from the federal transmission facilities, the Department of Revenue failed even to investigate whether Montana rural electric cooperatives should be subjected to the beneficial-use tax. As early as 1984 the Department was informed that discrimination against interstate commerce existed on

account of the Department's refusal to tax BPA preference customers for their analogous "use" of the BPA transmission system. However, the Department of Revenue had not even asked by the time of trial to examine contracts between BPA a[illegible] Montana rural electric cooperatives. Incorporated Tr. 918-19 (Whittinghill). The Department's failure even to investigate is damning proof of an intent to inflict a disproportionate economic burden on interstate commerce.

b. The Department's Assumption that All Power BPA Transmits to PGE Must Go Over 500-kV Facilities, and that Therefore None of that Power Goes over Tax-Exempt Lower-Voltage Main Grid Facilities, Results in Inflicting a Disproportionate Tax Burden on PGE's Oregon Customers.

The second example of discriminatory implementation of the beneficial-use tax was elicited from the Department's appraiser. During her testimony she admitted that she calculated PGE's alleged use based upon the assumption that 100 percent of the power transferred west of BPA's Garrison substation went over BPA's 500-kV system and, therefore, assumed that none went over the tax-exempt 230-kV system. Tr. 269 (Whittinghill). More specifically, she noted (1) that BPA was obligated to transmit 65 megawatts ("MW") of PGE's power west of Garrison in 1985, and (2) that the east-to-west capacity of the Hot Springs-Idaho border BPA 500-kV transmission line is 1300 MW. In determining the amount of taxes due, the Department's appraiser testified that she multiplied a fraction times the depreciated cost of the Hot Spring-Idaho border line. That fraction was simply 65 MW over 1300 MW, indicating that all PGE power flowing west of Garrison had to go over the Hot Springs-Idaho border facilities and *none* over the many tax-exempt BPA 230-kV facilities. *Id.* This approach to taxation is clearly at odds with all of the expert engineering testimony in the record to the effect that power will flow over all interconnected lines, not just 500-kV facilities. Had the Department taken tax-exempt facilities into account, it would have produced a far lower taxable value. Once again, the Department's administrative approach inflicts a disproportionate tax burden upon PGE's Oregon customers.

c. The Department's Failure to Recognize the Value of West-to-East Transfer Capability on the Hot Springs-Idaho Border BPA 500-kV Facilities Results in Disproportionate Taxes Being Imposed on PGE.

It is undisputed that BPA's Hot Springs-Idaho border 500-kV transmission facilities are used to transmit power from west to east as well as from east to west. Indeed, the Department of Revenue's own Exhibit 6C establishes that during the assessment year power was actually flowing *into* Montana over the lines, a consequence that certainly must be considered beneficial to Montana citizens. The Department's appraisal approach, however, assumes that the *sole* value of the Hot Springs-Idaho border line stems from its ability to export power from Montana. The Department of Revenue's appraiser testified that, to determine taxable value, she took the total *one*-directional capacity of the line (1300 MW), and used that number as the denominator of a fraction. The numerator of the fraction is 65 MW, which is the amount of power BPA has agreed to transmit over its main grid west of its main grid west of its Garrison substation pursuant to Exhibit D of the BPA transmission agreement, Plaintiff's Exhibit 14; Tr. 246-47, 250-51 (Whittinghill). This fraction (65/1300) reduces to 1/20, which is five percent. The Department of Revenue multiplied that five percent figure times the full depreciated cost of the Hot Springs-Idaho border facilites.

A simple example illustrates the error in the Department of Revenue's approach. Assume that BPA has one contract for transmitting 1300 MW from east to west over the Hot Springs-Idaho border facilities and another contract for transmitting 1300 MW from west to east.[18] The engineering testimony and power-flow studies in the record establish that such an occurrence is certainly physically possible; indeed, it is likely that the power flows in such a situation would cancel one another. However, if the Department of Revenue's approach were used, the tax imposed upon

[18]This example is for illustrative purposes only; as indicated above, certainly much less than all of the power transmitted over BPA's main grid west of Garrison substation would *not* flow over the Hot Spring-Idaho border facilities.

those "users" of the transmission facilities under such contracts would be *two times* the amount of taxes otherwise due from a private party owning the entire facilities outright. Thus by failing to consider the value contained in the bidirectional capacity of the transmission facilities, the Department of Revenue discriminated against those who allegedly use federal transmission facilities.

D. The Fourteenth Amendment: Montana's Imposition of Beneficial-Use Taxes on Federal High-Voltage Transmission Facilities Violates the Due Process and Equal Protection Clauses.

Both the due Process Clause and the Equal Protection Clause of the fourteenth amendment apply to this controversy. Briefly, the Due Process Clause involves questions of restraint and proportionality, while the Equal Protection Clause measures whether persons similarly situated are treated equally. Moreover, the fourteenth amendment challenge in some aspects parallels the Commerce Clause challenge and, thus, the facts in the record alluded to in the Commerce Clause portion of this Petition are equally applicable here.

Under the Due Process Clause, there is an insufficient nexus between PGE and the Hot Springs-Idaho border facilities to allow imposition of the challenged taxes. As this Court stated, the question is

> whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.

Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940). *See also Norfolk & Western Railway Co. v. Missouri State Tax Commission*, 390 U.S. 317 (1968) (invalidation of taxes that were not related closely of the value of the property interest being taxed). Of particular significance here is the fact that PGE has absolutely no right of access to any portion of the property being taxed; indeed, as noted previously, BPA is not required to employ the Hot Springs-Idaho border facilities in providing transmission services to PGE. Moreover, PGE's own nearest facilities are hundreds of miles dis-

tant. In sum, there is simply not sufficient nexus between PGE and the Hot Springs-Idaho border facilities to justify the Department's imposition of taxes.

The Equal Protection challenge is based upon the Department's refusal even to consider treating taxpayers similarly situated equally. Unequal administration of tax laws has long been a basis for invoking the Equal Protection Clause. *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907). The Department's utter failure even to investigate whether Mont. Code Ann. § 15-24-1203 should be imposed upon Montana rural electric cooperatives' use of the federal 500-kV Hot Springs-Idaho border facilities employed by BPA to deliver power to the cooperatives is perhaps the most flagrant example possible of both discriminatory intentions and consequences.

Finally, the Department of Revenue has inflicted an unequal burden. In the long history of the Department's administration of Mont. Code Ann. § 15-24-1203 the Department has always required (1) physical possession of the otherwise tax-exempt facilities coupled with (2) exclusive use of the property in order to trigger tax liability. In the instant situation, the Department has required *neither*. Accordingly, the Department's conduct violates the Equal Protection Clause of the fourteenth amendment.

E. Conclusion.

A writ of certiorari should issue to the Montana Supreme Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PORTLAND GENERAL ELECTRIC COMPANY,
Petitioner,

v.

MONTANA DEPARTMENT OF REVENUE,
et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the United States Constitution, article VI, clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Consitution or Laws of any State to the Contrary notwithstanding.

The Commerce Clause of the United States Constitution, article I, section 8, clause 3, provides:

> [The Congress shall have power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Section 2121(a) of the Tax Reform Act of 1978, 15 U.S.C. § 391 (1982) ("Anti-Discrimination Act"), provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For the purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

The fourteenth amendment to the United States Constitution, section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 4 of the Pacific Northwest Federal Transmission System Act, 16 U.S.C. § 838b (1982), provides:

> The Secretary of Energy, acting by and through the Administrator [of the Bonneville Power Administration] shall operate and maintain the Federal transmission system within the Pacific Northwest and shall construct improvements, betterments, and additions to and replacements of such system within the Pacific Northwest as he determines are appropriate and required to:
>
> (a) integrate and transmit the electric power from existing or additional Federal or non-Federal generating units;
>
> (b) provide service to the Administrator's customers;
>
> (c) provide interregional transmission facilities, or
>
> (d) maintain the electrical stability and electrical reliability of the Federal system; *provided, however*, That the Administrator shall not construct any transmission facilities outside the Pacific Northwest, excepting customer service facilities within any contiguous areas, not in excess of seventy-five airline miles from said region, which are a part of the service area of a distribution cooperative which has (i) no generating facilities, and (ii) a distribution system from which it serves both within and without said region, nor shall he commence construction of any major transmission facility within the Pacific Northwest, unless the expenditure of the funds for the initiation of such construction is specifically approved by Act of Congress.

Section 7(m) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. § 839e(m) (1982), provides:

> (1) Beginning the first fiscal year after the plan and program required by section 839b(d) and (h) of this title are finally adopted, the Administrator may, subject to the provisions of this section, make annual impact aid payments to the appropriate local governments within the region with respect to major transmission facilities of the Administrator, as defined in section 3(c) of the Federal Columbia River Transmission Act —
>
> (A) which are located within the jurisdictional boundaries of such governments,
>
> (B) which are determined by the Administrator to have a substantial impact on such governments, and
>
> (C) where the construction of such facilities, or any modification thereof, is completed after December 5, 1980, and, in the case of a modification of an existing facility, such modification substantially increases the capacity of such existing transmission facility.
>
> (2) Payments made under this subsection for any fiscal year shall be determined by the Administrator pursuant to a regionwide, uniform formula to be established by rule in accordance with the procedures set forth in subsection (i) of this section. Such rule shall become effective upon its approval, after considering its effect on rates established pursuant to this section, by the Federal Energy Regulatory Commission. In developing such formula, the Administrator shall identify, and take into account, the local governmental services provided to the Administrator concerning such facilities and the associated costs to such governments as the result of such facilities.

(3) Payments made pursuant to this subsection shall be made solely from the fund established by section 11 of the Federal Columbia River Transmission System Act. The provisions of section 13 of such Act, and any appropriations provided to the Administrator under any law, shall not be available for such payments. The authorization of payments under this subsection shall not be construed as an obligation of the United States.

(4) No payment may be made under this subsection with respect to any land or interests in land owned by the United States within the region and administered by any Federal agency (other than the Administrator), without regard to how the United States obtained ownership thereof, including lands or interests therein acquired or withdrawn by a Federal agency for purposes of such agency and subsequently made available to the Administrator for such facilities.

Section 1341 of Title 28, U.S.C. (1982), provides:

The district courts shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Montana's "beneficial-use" tax statute, Mont. Code Ann. § 15-24-1203 (1987), provides (the penultimate sentence was added by the 1983 Legislature, and the last sentence was added by the 1987 Legislature):

> After March 17, 1969, there is imposed and shall be collected a tax upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation. No tax may be imposed upon the possession or other beneficial use of buildings owned by public entities and located upon public airports. However, privately owned buildings located on such airport property are subject to tax. No tax shall be imposed upon the possession or other beneficial use of public lands occupied under the terms of mineral, timber or grazing leases or permits issued by the United States or the State of Montana or upon any easement unless the lease, permit, or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit, or easement relates. The tax shall be imposed upon the possession or other beneficial use of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax. The tax may not be imposed upon the possession or other beneficial use of railroad right-of-way or track acquired by the state pursuant to Title 60, chapter 11, part 1, as long as the state retains ownership and the right-of-way and track is [*sic*] used exclusively for rail transportation.

Montana's definition of Class Eleven property, Mont. Code Ann. § 15-6-141 (1987) provides:

(1) Class eleven property includes:

(a) centrally assessed electric power companies' allocations, including, if congress passes legislation that allows the state to tax property owned by an agency created by congress to transmit or distribute electrical energy, allocations of properties constructed, owned, or operated by a public agency created by the congress to transmit or distribute electric energy produced at privately owned generating facilities (not including rural electric cooperatives);

(b) allocations for centrally assessed natural gas companies having a major distribution system in this state; and

(c) centrally assessed companies' allocations except:

(i) electric power and natural gas companies' property

(ii) property owned by cooperative rural electric and cooperative rural telephone associations and classified in class five;

(iii) property owned by organizations providing telephone communications to rural areas and classified in class seven;

(iv) railroad transportation property included in class fifteen; and

(v) airline transportation property included in class seventeen.

(2) Class eleven property is taxed at 12% of market value.

Montana's definition of Class Five property, Mont Code Ann. § 15-6-135 (1987), provides:

(1) Class five property includes:

(a) all property used and owned by cooperative rural electrical and cooperative rural telephone associations organized under the laws of Montana, except property owned by cooperative organizations described in subsection (1)(b) of 15-6-137;

(b) air and water pollution control equipment as defined in this section;

(c) new industrial property as defined in this section;

(d) any personal or real property used primarily in the production of gasohol during construction and for the first 3 years of its operation;

(e) all land and improvements and all personal property owned by a research and development firm, provided that the property is actively devoted to research and development;

(f) machinery and equipment used in electrolytic reduction facilities.

(2)(a) "Air and water pollution equipment" means facilities, machinery, or equipment used to reduce or control water or atmospheric pollution or contamination by removing, reducing, altering, disposing, or storing pollutants, contaminants, wastes, or heat. The department of health and environmental sciences shall determine if such utilization is being made.

(b) The department of health and environmental sciences' determination as to air and water pollution equipment may be appealed to the board of health and environmental sciences and may not be appealed to either a county tax appeal board or the state tax appeal board. However, the appraised value of the equipment as determined by the department of revenue may be appealed to the county tax appeal board and the state tax appeal board.

(3) "New industrial property" means any new industrial plant, including land, buildings, machinery, and fixtures, used by new industries during the first 3 years of their operation. The property

may not have been assessed within the state of Montana prior to July 1, 1961.

(4)(a) "New industry" means any person, corporation, firm, partnership, association, or other group that establishes a new plant in Montana for the operation of a new industrial endeavor, as distinguished from a mere expansion, reorganization, or merger of an existing industry.

(b) New industry includes only those industries that:

(i) manufacture, mill, mine, produce, process, or fabricate materials;

(ii) do similar work, employing capital and labor, in which materials unserviceable in their natural state are extracted, processed, or made fit for use or are substantially altered or treated so as to create commercial products or materials; or

(iii) engage in the mechanical or chemical transformation of materials or substances into new products in the manner defined as manufacturing in the 1972 Standard Industrial Classification Manual prepared by the United states office of management and budget.

(5) New industrial property does not include:

(a) property used by retail or wholesale merchants, commercial services of any time, agriculture, trades, or professions;

(b) a plant that will create adverse impact on existing state, county, or municipal services; or

(c) property used or employed in any industrial plant that has been in operation in this state for 3 years or longer.

(6) Class five property is taxed at 3% of its market value.

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

PORTLAND GENERAL ELECTRIC COMPANY,
Plaintiff,

-vs-

THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; MINERAL COUNTY;
BILLYE ANN BRICKER, Treasurer of Mineral County;
SANDERS COUNTY; JUNE M. THAYER,
Treasurer of Sanders County; and
ED ARGENBRIGHT, Montana State Superintendent
of Public Instruction,
Defendants.

Cause No. ADV-86-200

ORDER

This is a proceeding for declaratory and injunctive relief brought under Section 15-1-406, MCA, and Title 27, Chapter 8, MCA, to determine the validity of a beneficial use tax set forth in Section 15-24-1203, MCA, which has been assessed against Plaintiff for the year 1985 with regard to the 500 kV transmission lines between Hot Springs, Montana and the Idaho border.

Plaintiff is Portland General Electric Company (PGE), an Oregon corporation which provides retail electric utility service to customers in Oregon. Defendants are the Montana Department of Revenue (DOR); Mineral and Sanders counties; Billye Anne Bricker and June M. Thayer, the county treasurers of the above counties; and Ed Argenbright, State Superintendant of Public Instruction.

Most of the background of this case is the same as that set forth on pages 3-22 of this Court's Order in Cause No. 50978 dated December 21, 1987. The additional facts relevant to this case are set forth below.

Because PGE and the other Colstrip Owners "requested Bonneville to provide adequate transmission facilities and services west of Garrison, Montana to transmit to Colstrip power on a firm basis over the Federal Transmission system to their system loads and [because] Bonneville .... agreed to provide such transmission facilities and services," PGE and the Bonneville Power Administration (BPA) entered into the Garrison West Agreement on April 17, 1981. (Plaintiff's Exhibit 14 in Cause No. 50978 at 2 - 3) Under such Agreement, PGE made available and BPA was required to accept scheduled power not to exceed the reserved transmission demand set forth on Exhibit D of the Agreement. Exhibit D provided that from the effective date of the exhibit [the date of commercial operation of Colstrip Unit No. 3, i.e., October of 1983 — See Pretrial Order at 5] until the date when a 500 kV transmission line connecting Garrison to the Federal 500 kV main transmission system at or west of Hot Springs first became available for scheduling power, (i.e., 1986) the transmission demand for PGE was 0 kV. However, according to the footnote following this transmission demand of zero, PGE was to advise BPA of its transmission demand by April 6, 1982. The footnote also provided that the sum of the Colstrip Owners' transmission demands was limited to 330 megawatts.

On December 20, 1983, Richard Cromer of the Montana Power Company (one of the Colstrip Owners) wrote to Thomas Noguchi of

BPA as follows:

> The Colstrip Owners have just recently reached agreement on the following allocation of BPA's 330 MWs:
>
> > Effective for the period beginning at 2400 hours on the date of commercial operation of Colstrip No. 3 and ending at 2400 hours on the date when a 500 kV line connecting Garrison to the Federal 500 kV main transmission system at or west of Hot Springs (Taft) first becomes available for scheduling power; the agreed upon allocation of Bonneville's 330 MW transfer capability is:

Company	Bonneville Contract No.	Transmission Demand
. . .		
Portland	DE-MS79-81BP90167	65MW

(Defendants' Exhibit 3 in Cause No. 86-200)
BPA responded on February 14, 1984 stating:

> This is to confirm that each of your companies .... has sent BPA a letter agreeing with the allocation, contained in Montana Power Company's letter dated December 20, 1983, of the 330 MW of transmission capacity available to the Colstrip owners on BPA's Garrison-Hot Springs transmission line during the period starting with commercial operation of Colstrip Unit No. 3 and ending at 2400 hours on the date when the Garrison-Taft 500 kV transmission line is available for scheduling power, pursuant to existing contracts for wheeling Colstrip power.
>
> . . .

Company	Bonneville Contract No.	Transmission Demand
. . .		
Portland	DE-MS79-81BP00167	65MW

(Defendants' Exhibit No. 2 in Cause No. 86-200) (Emphasis supplied) According to Plaintiff's Exhibit 35 [Cause No. 86-200], Exhibit D of PGE's Garrison West Agreement was subsequently revised to show a transmission demand of 65 MW.

The term of PGE's Garrison West Agreement is 22 years and PGE has the right to renew. PGE had no other agreement for the transmission of its Colstrip power to points west. After scheduling over the Hot Springs to border lines began in October of 1983, PGE became obligated to pay a monthly charge to BPA calculated pursuant to the terms of the Agreement.

The term of PGE's Garrison West Agreement is 22 years and PGE has the right to renew. PGE had no other agreement for the transmission of its Colstrip power to points west. After scheduling over the Hot Springs to border lines began in October of 1983, PGE became obligated to pay a monthly charge to BPA calculated pursuant to the terms of the Agreement.

In 1985, PGE submitted a report pursuant to Rule 42.22.107, ARM, stating that it "had no possession or use of a government-owned transmission line in 1984; it had only a contract right to certain services provided by Bonneville Power Administration ("Bonneville") on the 500-kilovolt transmission line of Townsend-to-Garrison and Hot Springs-to-Idaho border. (Defendants' Ex. 28, Cause No. 50978) (Emphasis supplied) DOR assessed the Hot Springs to border line based on such report. (Tr. at 226) Ms. Whittinghill did not receive reports from any of the other Colstrip Owners or any other entities with respect to the use of this portion of the line during 1984. (Tr. at 228) With regard to BPA's preference customers, namely cooperatives, Ms. Whittinghill stated that it was not DOR's "impression that any cooperatives were wheeling or using these power lines to transfer their own power on these government lines." (Tr. at 259)

DOR prepared a beneficial use tax assessment for PGE for 1985 using the unit approach. Unlike its assessment in Cause No. 50978, DOR, in its first assessment of the Hot Springs to border lines, capitalized payments made by PGE to BPA in 1984. However, after deposing several PGE and BPA officials in 1986, DOR and PGE learned that BPA's charges represented charges for use of both 230 and 500 kV lines. DOR then issued a revised assessment excluding the 230 kV lines. Ms. Whittinghill testified as follows:

> This time in order to — this time in order not to have any 230 kV line charges included in our assessment we asked them to provide us specifically with detailed cost information on charge or installed cost of the entire portion of the Dworshak to Hot Springs power line located within the State of Montana.

(Tr. at 244)

Ms. Whittinghill determined the cost of the Hot Springs to border line at about $11,500,000 on the basis of Defendants' Exhibit 1 — "Plant Investment, Analyzed Plant by Work Order Number" dated October 21 and 22, 1986. (Tr. at 244-249) Then, as per the information provided by Mr. Eskridge of BPA, she awarded 13 years of depreciation based upon a 35-year life. (Id.) After depreciation, the line was valued at about $7,000,000. (Tr. at 249) Then, based upon Mr. Eskridges's statement that the "total transmission capacity is 1,300 megawatts" [see Defendants' Exhibit 22] and the firm reserved transmission demand of 65 MW [see p.4 of this Opinion], Ms. Whittinghill obtained a 5% figure ($^{65}/_{1300}$). Ms. Whittinghill then "multiplied five percent, which is the relationship of their (PGE's) use of that line to the total capacity, times the total depreciated cost of that line to determine Portland General Electric's value for that line for 1985." (Tr. at 250-1) The result was $360,365. As in Cause No. 50978, DOR incorporated such amount into the cost indicator which was then weighted by 40% and added to the income and stock and debt indicators. (See Defendants' Exhibit 17) The resulting figure was multiplied by the percentage of PGE's value subject to assessment in Montana and then apportioned to each of the appropriate taxing jurisdictions.

Ms. Whittinghill testified that she did not include any influence or effect of the utilization of a 230 kV transmission line property because she "only utilized the total cost of the Dworshak [Hot Springs] line." (Tr. 255) Ms. Whittinghill also testified:

> It was our understanding initially that from conversations with Bonneville Power representatives that the Dworshak power line in fact had to be used to transfer power outside of Montana, if the power companies were

not having some type of wheeling arrangements with either Montana Power or Washington Water Power, that in fact that the Dworshak line would have been – in their assumption of their contract path or whatever would have been in there, and that is why our assumptions have the Dworshak line as being used.

(Tr. at p. 271)

Q .... I would like to refer that back to you and ask you why you assumed in 1985 that Dworshak was the only line for which – which would be used by Bonneville to make the deliveries under the Garrison West contract?

A. Well if we want to back up, I would say that the first indication that I had that – from Portland General Electric, that the power line was being utilized, was their report to the department that specifically broke down their allocated use of the line based on charges. At that point it was really not known that the 230 kV charges were included in those wheeling or contract charges that Portland General Electric was paying to Bonneville. It was also then through conversations with Bonneville personnel indicated to the department that that would be basically the assumed contract path for purpose of determining the airline miles to transmit Colstrip power out of Montana.

(Tr. at p. 280)

In responding to DOR's inquiries, PGE stated as follows:

BPA's transmission service charges paid as they relate to the Colstrip Unit #3 project are as follows:

$3,380,840 Townsend Substation to Garrison Substation

$1,300,377 Garrison Substation to Pearl Substation (in Oregon)

Since the physical wheeling of energy is not specific as to which lines the energy transmits over but rather the energy can be traveling over various lines as long as the final end result or delivery point is to where our

> contracts specify, PGE cannot proportion the exact service charges for the transmission lines in the State of Montana. However, if one can say that the wheeling of power is transmitted over the most direct transmission line to the delivery point, then all Townsend-Garrison service charges and an estimated 63 miles of 632 miles of the Garrison-Pearl service charges relate to the State of Montana government lines 500 kV or greater.
>
> BPA's intertie wheeling charges for Colstrip in 1984 is $574,298 for power transmitted from Hot Springs Substation to Pearl Substation. Again, if the most direct pathways are used, then an estimated 63 miles of the total estimated 500 miles of the charges relate to the State of Montana government transmission lines 500 kV or greater.

(Plaintiff's Exhibit 36)

And, as quoted earlier in this Opinion, PGE also stated that it "had only a contract right to certain services provided by Bonneville Power Administration .... on the 500-kilovolt transmission line of .... Hot Spring-to-Idaho border." (Plaintiff's Exhibit 29)

Lastly, as stated in this Court's Opinion in Cause No. 50978: "The choice for long distance transmission, i.e., over 100 miles, would be the highest voltage line which, in the case of BPA's system, would be 500 kV."

Plaintiff sets forth eight counts alleging that the imposition of the beneficial use tax is illegal. Seven of the counts are the same or very similar to the seven counts set forth in Cause No. 50978. This Court's Opinion in Cause No. 50978 is equally applicable to the seven counts raised in this Cause No. 86-200. PGE has a clearly distinguishable use interest in the Hot Springs to border 500 kV line. Plaintiffs first seven counts fail as per the reasoning set forth in the Opinion dated December 21, 1987 in Cause No. 50978.

In Count 8 of its Complaint, PGE contends that the beneficial use tax is illegal in that it taxes BPA lines of under 500 kV which are statutorily exempt from taxation. However, the testimony of the witnesses and the parties' exhibits indicate otherwise. Plaintiff's eighth claim also fails.

Plaintiff has not sustained its burden of proving that the imposition of beneficial use taxes pursuant to Section 15-24-1203, MCA, violates any statutory or constitutional rights. Therefore, this Court finds that such taxes have been lawfully imposed. Such taxes shall be disbursed from the protest accounts in which they are presently being held and shall be distributed as per Section 15-1-402, MCA.

IT IS SO ORDERED:

DATED this 19th day of January, 1988.

DISTRICT JUDGE

pc: Counsel of record

No. 88-160

IN THE SUPREME COURT OF THE STATE OF MONTANA

1989

PORTLAND GENERAL ELECTRIC COMPANY,
Plaintiff and Appellant,

-vs-

MONTANA DEPARTMENT OF REVENUE,
et al.,
Defendants and Respondents.

APPEAL FROM: District Court of the First Judicial District In and for the County of Lewis & Clark, The Honorable Henry Loble, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Donald R. Murray; Murphy, Robinson, Heckathorn & Phillips, Kalispell, Montana
Thomas H. Nelson argued; Stoel Rives, Boley, Jones & Grey, Portland, Oregon

For Respondent:

Larry G. Schuster argued, Department of Revenue, Helena, Montana

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Submitted: February 28, 1989
Decided: May 10, 1989

Mr. Justice John Conway Harrison delivered the Opinion of the Court.

Appellant, Portland General Electric (hereinafter PGE), appeals an order entered by the Honorable Henry Loble, First Judicial District Court, Lewis and Clark County, Montana, denying injunctive and declaratory relief. We afffirm.

This case concerns the imposition of beneficial use taxes, pursuant to § 15-24-1203, MCA (1983), for appellant's use of the Hot Springs to Idaho Border portion of the BPA 500 kilovolts (KV) transmission line system within the State of Montana.

> [T]here is imposed and shall be collected a tax upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation .... The tax shall be imposed upon the possession or other beneficial use of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax.

Section 15-24-1203, MCA.

Much of the factual background surrounding this case has previously been discussed in our decision, Pacific Power & Light Co. v. Department of Revenue, No. 88-151, decided April 17, 1989. Therefore, we will limit the extensive background discussion and instead focus on the additional facts relevant to this case.

PGE is an investor-owned utility which provides retail electric utility service to customers located in the State of Oregon. PGE owns an undivided 20% interest in Colstrip Units III and IV, which began operation in October of 1983 and 1985, respectively. The other four Colstrip owners are Pacific Power & Light Company, Washington Water Power Company, Puget Sound Power & Light Company, and Montana Power Company. Collectively, these companies are referred to as the "Colstrip Owners."

With the development of Colstrip Units III and IV, additional transmission capacity was needed from the Colstrip facilities to the west. To accommodate the increased generation, Colstrip Owners initially

converted one 230 KV line extending from the generating facilities to a substation near Broadview, Montana, to 500 KV and constructed a second 500 KV line. From the Broadview substation, the Colstrip Owners' 500 KV lines extend westward to a point near Townsend, Montana. At Townsend, the Colstrip Owners' 500 KV lines interconnect with the Bonneville Power Administration's (BPA) 500 KV lines. The portion extending from Townsend to the BPA's Garrison substation is referred to as the Montana Intertie, and is extensively discussed in our previous opinion, Pacific Power & Light Co. In 1986, anticipating the completion of Colstrip Unit IV, the BPA, at the request of the Colstrip Owners, completed the Garrison-West lines connecting the Garrison substation to the Taft, Montana, substation and points to the west. Prior to the completion of the Garrison-Taft 500 KV transmission lines, the Hot Springs-Dworshak lines were the only existing 500 KV lines providing access to the west.

From the BPA substation at Garrison, Montana, the transmission of Colstrip power is governed by separate contracts, commonly referred to as the Garrison-West Agreement. These contracts continue for a period of 22 years, with a right to renew at comparable terms. Under each Owners' separate contract with the BPA, power would be introduced at the Garrison substation and transmitted across the entire BPA "main grid" which included both 230 and 500 KV lines. Notably, appellant entered into no other agreement for the transmission of its Colstrip power to points west.

Under the terms of PGE's agreement with the BPA, PGE requested BPA provide adequate transmission facilities west of Garrison, Montana, to transmit power on a firm basis over the Federal Transmission System to PGE's system load at the Pearl substation in Oregon. PGE made available and BPA was required to accept scheduled power not to exceed the reserved transmission demand set forth on Exhibit D of the Garrison-West Agreement. Exhibit D provided that from the date of commercial operation of Colstrip Unit III until the date when the 500 KV transmission lines connecting Garrison to the Federal 500 KV transmission system first became available for scheduling power (the Garrison-Taft lines), the transmission demand for PGE was zero. However, a footnote to Exhibit D provided for the five Colstrip owners to allocate BPA's available 330 megawatts transmission capacity.

At this point, a brief explanation describing the 330 megawatt limitation is in order. From the Garrison substation to points west, the BPA lacked transmission line capacity to accomodate full transmission of Colstrip power to the Owners' individual system loads. This lack of transmission capacity is due to a gap in the 500 KV lines between the Garrison substation and the Hot Springs substation, referred to in this litigation as the "bottleneck." Between the two substations, the BPA had only 230 KV lines, which proved insufficient to accommodate the total scheduled Colstrip power. Recognizing its inability to fulfill obligations under the Garrison-West Agreements, the BPA imposed a 330 megawatt limitation upon the amount of power which could be scheduled west of the Garrison substation, until the Garrison-Taft 500 KV lines were completed.

On December 20, 1983, a Montana Power Company representative contacted BPA officials indicating Colstrip Owners had reached an agreement on the allocation of BPA's 330 megawatts. Respectively, PGE was allocated 65 megawatts transmission demand. The reserved amount is reflected in a revised Exhibit D to the PGE's Garrison-West Agreement. In turn, the BPA responded on February 4, 1984, stating:

> This is to confirm that each of your companies [Colstrip Owners] has sent BPA a letter agreeing with the allocation, contained in The Montana Power Company's letter dated December 20, 1983, of the 330 MW of transmission capacity available to the Colstrip owners on BPA's Garrison-Hot Springs transmission line during the period starting with commercial operation of Colstrip Unit No. 3 and ending at 2400 hours on the date when the Garrison-Taft 500 kV transmission line is available for scheduling power, pursuant to existing contracts for wheeling Colstrip power.
>
> . . .
>
> | Company | Bonneville Contract No. | Transmission Demand |
> |---|---|---|
> | . . . | | |
> | Portland | DE-MS79-81BP00167 | 65 MW |

Once scheduling of Colstrip power over the Hot Springs to border line began, PGE was required to pay BPA a monthly charge calculated pursuant to the terms of the Garrison-West Agreement. The transfer of energy was "deemed" to have occurred whether or not there was actual physical transmission. Therefore, the monthly charge was due BPA regardless of PGE's actual transmission flow across the lines.

Beginning in the tax year 1985, the Department of Revenue (DOR) imposed taxes upon appellant for its "beneficial use" of the BPA 500 KV transmission lines from Hot Springs to the Idaho border. The assessment was based upon a report submitted by PGE, pursuant to Rule 42.22.107, ARM, stating that it"had no possession or use of a government-owned transmission line in 1984; it had only a contract right to certain services provided by the Bonneville Power Administration ("Bonneville") on the 500-kilovolt transmission line" between Townsend-to-Garrison and Hot Springs-to-Idaho border. The other Colstrip Owners did not submit similar reports to the DOR. The DOR prepared a beneficial use assessment for PGE using the unitary approach. Initially, the DOR assessed PGE's use of the Hot Springs to border lines based upon the capitalized payments made by PGE to the BPA in 1984. However, shortly before trial, depositions revealed such payments represented charges for the use of both 230 and 500 KV lines. Thereafter, the DOR prepared a revised assessment excluding the effect of tax-exempt 230 KV lines.

Appellant presents eight issues on appeal, each of which would invalidate the imposition of the challenged taxes. Three of the issues arise under the United States Constitution, three under the Montana Constitution and two are statutory challenges. However, our decision in Pacific Power & Light, Co. forecloses appellant's arguments of the first seven issues. Therefore, our opinion will deal exclusively with appellant's eighth issue contending that a portion of the beneficial use tax assessment was attributable to exempt property.

This case comes to us against a backdrop of extensive technological changes in the electrical transmission industry. Goldberg v. Sweet (1989), _____ U.S. _____, 109 S.Ct. 582, 102 L.Ed.2d. 607. As noted in the factual discussion, BPA's entire integrated network

is used to schedule power. The power transmitted across electrical lines can not be accurately identified, and indeed, the path taken is often indirect and bears no relation to contract requisites. Instead, we have only the input point and the eventual withdrawal of energy at a specified location. Between the two, various factors indicate a likely, though not actual, transmission path.

Initially, we discuss our determination that PGE possessed a "beneficial use" within the meaning of the statute. Contrary to appellant's argument, no physical possession, exclusive use or control of the facilities is necessary. Rather, "beneficial use" has long been defined as a right recognized by law and enforceable by the courts.

> The expression "beneficial use" or "beneficial ownership or interest" in property is quite frequent in the law, and means, in this connection, such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner or of some one in his behalf.

Montana Catholic Missions v. Missoula county (1906), 200 U.S. 118, 127-128, 26 S.Ct. 197, 200, 50 L.Ed. 398, 402; See also Harrison v. City of Missoula (1965), 146 Mont. 420, 407 P.2d 703; Pacific Power & Light, Co. To advance its commercial activities, and thereby increase profits, PGE contracted for firm transmission capacity over the BPA lines. This is an enforceable contract interest in firm megawatts of power. While PGE may not possess the lines, nonetheless, the power flowing through the lines remain under PGE's ownership. Finally, PGE pays for the use of the lines regardless of the actual transmission flow. We find the reservation of firm transmission demand grants PGE an exclusive right taxable under § 15-24-1203, MCA.

The physical wheeling of energy is not specific as to which line it passes through, but rather the energy can travel through various lines as long as the delivery point is where the contract specifies. However, the facts reflect the essential nature of the Hot Springs-Dworshak lines. PGE contracts to transmit bulk transfers of power, necessitating the use of the higher voltage, lower impedance, 500

KV lines. Without the Hot Springs lines, the transfer capability of Colstrip power to the west would be substantially affected. Indeed, BPA officials indicated that it could not fulfill contract obligations absent the Hot Springs lines. Clearly, the Hot Springs lines are a vital portion of the BPA's main grid.

Appellant contends the DOR's assessment erroneously assumed that only 500 KV facilities would be used in providing services, ignoring the fact that a substantial portion of the transmission facilities consist of tax exempt 230 KV lines. PGE argues that in reality, the power is scheduled over the entire BPA transmission system and generally no line or path is associated with a particular power schedule.

The 500 KV lines from Hot Springs to the Idaho border are in the direct transmission path of PGE's bulk energy transfers to its Pearl substation. It is significant to note that no 230 KV lines exist parallel to the 500 KV lines. This fact strengthens the assumption that the 500 KV lines are essential to PGE's energy transfers in this case, and are properly taxed.

It is not disputed that the DOR did not rely on actual transmission flows. Rather, the assessment was based exclusively upon PGE's Garrison-West Agreement with the BPA providing for firm transmission rights. To eliminate any influence of 230 KV lines in the assessment, the DOR requested BPA to provide detailed information regarding the actual cost of the installed Hot Springs lines located within the State of Montana, and information regarding the total capacity of the lines and date of installation. From the total cost, the DOR applied a straight line depreciation to the amount, awarding 13 years depreciation based upon a 35 year life. To the depreciated cost, the DOR multiplied a fraction isolating PGE's interest in the lines, (denominator represents the lines' capacity; and the numerator consists of PGE's firm transmission demand). This value was then integrated into PGE's centralized assessment, and thereby subject to a 40% weighting figure which the DOR ascribes to the cost indicator. Puget Sound Power and Light Co. v. Department of Revenue (Mont. 1988), 761 P.2d 336, 45 St.Rep. 1078.

A tax for the beneficial use of property, as distinguished from a tax on property itself, is commonplace. Likewise, the United States

Supreme Court decisions support a tax measured by the value of the tax-exempt property:

> In measuring such a use tax it seems neither irregular nor extravagent to resort to the value of the property used; indeed no more so than measuring a sales tax by the value of the property sold .... In our judgment it was not an impermissible subterfuge but a permissible exercise of its taxing power for [the State] to compute its tax by the value of the property used.

United States v. City of Detroit (1958), 355 U.S. 466, 470, 78 S.Ct. 474, 476, 2 L.Ed.2d 424, 427; United States v. Boyd (1964), 378 U.S. 39, 84 S.Ct. 1518, 12 L.Ed.2d 713.

Reviewing the facts, we conclude that the tax was imposed on the privilege of using the property. The assessment reflects PGE's contractual reserve arrangement with the BPA, thereby ignoring actual flows and the lines' west to east transmission capacity.

Affirmed.

_____

Justice

We concur:

_____

Chief Justice

_____

_____

_____

_____

Justices

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

PACIFIC POWER & LIGHT COMPANY,
an Assumed Business Name of PacifiCorp,
a Maine Corporation;
PORTLAND GENERAL ELECTRIC COMPANY,
an Oregon Corporation;
THE WASHINGTON WATER POWER COMPANY,
a Washington Corporation;
PUGET SOUND POWER & LIGHT COMPANY,
a Washington Corporation;
THE MONTANA POWER COMPANY,
a Montana Corporation,
Plaintiffs,

-vs-

DEPARTMENT OF REVENUE OF THE
STATE OF MONTANA; JEFFERSON COUNTY;
SUSAN MILLER, Treasurer of Jefferson County;
BROADWATER COUNTY; IRENE KEMMER,
Treasurer of Broadwater County;
POWELL COUNTY; DALICE M. COOK,
Treasurer of Powell County
GRANITE COUNTY; HARRIET L. RYAN,
Treasurer of Granite County;
MISSOULA COUNTY; FERN HART,
Treasurer of Missoula County;
MINERAL COUNTY; BILLYE ANN BRICKER,
Treasurer of Mineral County;
SANDERS COUNTY, JUNE M. THAYER,
Treasurer of Sanders County; and
ED ARGENBRIGHT,
Montana State Superintendent of Public Instruction
Defendants.

Cause No. 50978

ORDER

This is a proceeding for declaratory and injunctive relief brought under Section 15-1-406, MCA, and Title 27, Chapter 8, MCA to determine the validity of a beneficial use tax assessed against Plaintiffs for the year 1984 with regard to the 500 kV transmission line between Townsend, Montana and Garrison, Montana.

OVERVIEW

A. PARTIES

Plaintiffs are 1) Pacific Power & Light Company (Pacific), an assumed business name for the electric utility operations of PacificCorp, a Maine corporation which provides retail electric utility service to customers located in Oregon, Washington, Wyoming, California, Idaho and Montana; 2) Puget Sound Power and Light Company (Puget), a Washington corporation which provides retail electric utility service to customers located in the western Washington area; 3) Portland General Electric Company (PGE), an Oregon corporation which provides retail electric utility service to customers located in Oregon; 4) Washington Water Power Company (Washington Water), a Washington corporation which provides retail electric utility service to customers located predominantly in Washington and Idaho; and 5) the Montana Power Company (MPC), a Montana corporation which provides retail electric service to customers located in Montana. MPC and Puget own an undivided interest in Colstrip Units 1 and 2. Each Plaintiff owns an undivided interest in Colstrip Unit 3, and four of the five Plaintiffs own an undivided interest in Colstrip Unit 4. Collectively, Plaintiffs are referred to as the "Colstrip Owners."

Defendants are the Montana Department of Revenue (DOR), an administrative agency of the State of Montana charged with administering the tax laws of the State of Montana; the counties of Jefferson, Broadwater, Powell, Granite, Missoula, Mineral, and Sanders, political subdivisions of the State of Montana; the treasurers of the above counties, Susan Miller, Irene Kemmer, Dalice M. Cook, Harriet L. Ryan, Fern Hart, Billye Ann Bricker, and June Thayer; and Ed Argenbright, the State Superintendent of Public Instruction.

B. HISTORY

1. Colstrip 1 and 2

Colstrip, Montana became the site for two coal-fired electricity-generating stations in the mid-1970's when MPC and Puget constructed Colstrip Units 1 and 2. Colstrip Unit 1 was placed in commercial service on September 24, 1975 and Colstrip Unit 2 on May 22, 1976. Each unit is rated at 330 megawatts. MPC has operated and maintained these units and continues to do so.

A 230 kV line from the Billings area to Colstrip was built to help supply the necessary power to build the Colstrip facilities. Two 230 kV lines were constructed from the Colstrip facilities to a point near Broadview in order to move future energy out of Colstrip. (Tr. p. 202) The 230 kV lines were adequate for transmission of energy from Colstrip 1 and 2 to points west. (Tr. pp. 230-231, 233) MPC performed a wheeling service for Puget in order to get Puget's power to points west. (Tr. p. 231)

2. Colstrip 3 and 4

The Colstrip Owners subsequently constructed Colstrip Units 3 and 4. Each of these units is rated at 770 megawatts. Thus, approximately 2,200 megawatts of electric energy is generated at Colstrip Units 1, 2, 3, and 4. (Tr. p. 99) Colstrip Unit 3 was declared to be in commercial service in January of 1984 and Colstrip Unit 4 was so declared in April of 1986. (Pre-Trial p. 4)

Mr. Brush, an MPC employee, testified that, prior to constructing Colstrip Units 3 and 4, the Colstrip Owners knew there was insufficient transmission capacity to transmit power from those units to points west. (Tr. p. 231) The preexisting 230 kV lines were insufficient for transmission of power from Colstrip Units 1, 2, and 3. (Tr. p. 103) The additional megawatts from Units 3 and 4 necessitated a direct 500 kV path for purposes of transmission to Garrison. (Tr. p. 103) Plaintiffs concede that with the added generation from Units 3 and 4, increased transmission capability was needed. (Plaintiffs' Proposed Finding of Fact No. 7) Therefore, the Colstrip Owners converted the two 230 kV circuits to a single 500 kV transmission line, providing a direct path from Colstrip to Broadview. (Tr. p. 102) (The western United States has a maximum AC voltage of 500 kV. The choice for

long distance transmission, i.e., over 100 miles, would be the highest voltage line which, in the case of BPA's system, would be 500 kV. Long distance lines would generally be limited by stability. A stability limited 500 kV transmission line has the capacity to transmit approximately 4.7 times as much power as a stability limited 230 kV transmission line. (Tr. pp. 53, 56, 57) The Colstrip Owners also constructed a substation at Broadview. (Tr. pp. 232 and 102) Then they built a double circuit 500 kV transmission line from Broadview to a point near Townsend to accommodate the output of Colstrip Units 3 and 4 and Puget's share of 1 and 2. The capacity of both these segments of transmission line is about 2,000 megawatts. (Tr. pp. 234 and 105) It cost the Colstrip Owners $220,000,000 to build the Colstrip-Townsend lines. (Tr. pp. 235 and 236)

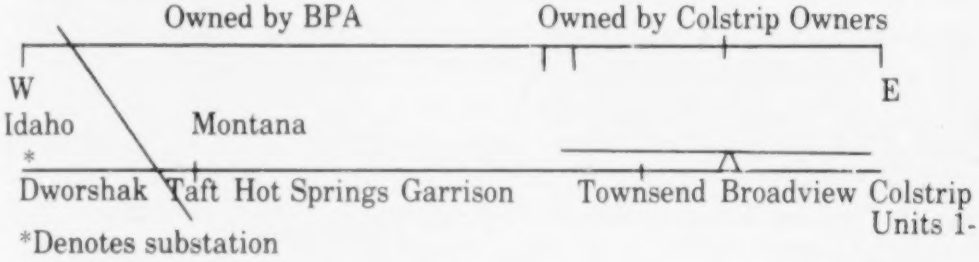
On behalf of the Colstrip Owners, MPC requested the Bonneville Power Administration (BPA) to interconnect the federal transmission system with the Colstrip Owners' project somewhere in the vicinity of Helena and Ovando. (Tr. p. 238) (Exhibit 4 4) The Colstrip Owners requested BPA's help because they were unable to obtain a right-of-way across an Indian reservation, and BPA had such a right-of-way that was thought to be sufficient to handle a 500 kV line. (Tr. p. 238) The Colstrip Owners wished to connect to the federal system because most of their load centers were located within BPA's service area. (Tr. p. 239) (See p. 2 of this Opinion. Only MPC and Pacific have customers in Montana.) BPA built 500 kV transmission lines commencing at Townsend. (Pre-trial p. 3)

The Townsend-Garrison segment was designed to specifically interact and be an integral part of the Colstrip-Garrison transmission project. (Tr. p. 104) Mr. Brush testified that if BPA had not constructed the line, someone, probably the Colstrip Owners, would have constructed it. (Tr. p. 240) Without the Townsend-Garrison segment, Colstrip Units 3 and 4 could not be effectively used. (Id.) There are no other adequate transmission paths by which Colstrip power from Units 1 through 4 could be transmitted to Garrison. (Tr. p. 104) It was necessary to have the complete Colstrip-Garrison transmission line system if power was to be transmitted from Colstrip to Garrison. (Tr. pp. 104 and 105) If 2,000 megawatts of energy were not available at Colstrip, the Broadview-Garrison segment would not have been constructed at the time it was. (Tr. pp.

374-375)

Although not at issue in this case, Colstrip generation also precipitated the construction of the Garrison-Taft line. (Id.)

The 500 kV transmission lines from Colstrip to the west are illustrated as follows:



*Denotes substation

There are no 500 kV transmission lines from Colstrip east. There are no other 500 kV lines in Montana.

3. BPA

a) General

Mr. Porter testified as follows:

> "The Bonneville Power Administration is a power marketing agency of the federal government. It is responsible for marketing the power that is generated by federal hydroelectric sites and other resources that are acquired by Bonneville in the Pacific Northwest. It essentially markets that power by selling it to the various customers in the northwest, preference customers and others."

(Tr. p. 32)

BPA is the dominant transmission system of the Pacific Northwest. (Tr. p. 303) It owns about ¾ of the total transmission grid in the northwest. (Tr. p. 36) The Federal Columbia River Transmission System is the system of transmission lines, substations, and related facilities owned by BPA plus those facilities over which BPA has obtained rights of usage through lease or other agreement. (Tr. pp. 35, 36, 330) Townsend, Montana is considered the eastern most part of

the Federal Columbia River Transmission System. (Tr. p. 330)

b) BPA Customers

i) Preference Customers

The Bonneville Project Act that established BPA provided that power generated by federal facilities should go first to public agencies including municipalities, co-ops, public utility districts and some federal agencies. (Tr. p. 35) These customers are preference customers. (Id.) Rural electric co-ops are one element of the preference customer class and, in Montana, include Lincoln Electric Cooperative, Flathead Electric Cooperative, Missoula Electric Cooperative, Ravalli County Electric Cooperative, Vigilante Electric Cooperative, and Glacier Electric Cooperative. (Tr. p.492) Most of BPA's preference customers in Montana are served through wheeling arrangements with an intermediate utility. (Tr. pp. 150-151) For example, MPC transmission lines are used to deliver federal power to Ravalli County Electric Cooperative. (Tr. p. 151) BPA makes enough energy available to MPC to cover the loads of BPA's customers. It was not necessary to build the Townsend-Garrison line to serve Montana preference customers. (Tr. p. 373) BPA did not construct the Townsend-Garrison line to serve BPA's preference customers (Tr. p. 264) Construction of the Colstrip Units did not enhance BPA's service to its preference customers although any time a major addition is made to the system, the system's reliability increases. (Tr. p. 566) The Townsend-Garrison transmission line is not designated as a transmission facility used to serve preference customers. (Tr. p. 151) The Townsend-Garrison line is not contractually used to serve BPA preference customers. BPA's preference customers are not billed for any use of the Townsend-Garrison line. (Tr. pp. 151-152, 581) There was no reason to believe that a 500 kV line from Townsend-Garrison was needed to provide adequate wheeling to BPA for preference customers. (Tr. p. 264 and 372)

ii) Direct Service Industry Customers

Direct Service Industry (DSI) customers are those who receive power directly from BPA for their own end use. (Tr. p. 485) They have access to the federal system but they do not have preference rights. (Tr. pp. 485-486) DSI loads are firm loads to which BPA is committed. (Tr. p. 570) The Columbia Falls aluminum plant is BPA's only Montana DSI. It has a power demand of 345 megawatts. (Tr. pp. 485-488)

c) Generation

Federal power is power from the federal generation system. There are two such facilities in Montana – the Libby project at about 500 megawatts and Hungry Horse at about 300 megawatts. (Tr. pp. 483 and 495) First call of that power goes to preference customers. However, with regard to Hungry Horse, the first preference is preference customers in western Montana. The second preference is preference customers in all of the State of Montana. The remaining power is available to the northwest. (Tr. p. 484) Generation from Libby and Hungry Horse is greater than the federal loads in western Montana. (Tr. at pp. 563 and 495)

d) Impact Aid Payments

Impact aid was available to Montana counties affected by the construction of the Townsend-Garrison 500 kV transmission line. Such aid was congressionally approved by virtue of the enactment of Section 7(m) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980. However, BPA's impact aid policy was not promulgated until March 18, 1985 and was not approved by the Federal Energy Regulatory Commission until 1986.

BPA prepared its impact aid policy to provide for three types of impact aid: preconstruction, construction, and post-construction. Preconstruction impact aid was directly billable by the counties for services they provided primarily with regard to the location of the line. (Tr. pp. 503-504) No preconstruction aid was requested or paid. Mr. Eskridge testified that the Act had not been passed at the time applicable for preconstruction aid. (Tr. p. 506) Construction impact aid was designed by BPA to reimburse affected counties for the presence of a non-local work force during the construction period.

Mr. Eskridge testified:

> "[I]mpact aid again in our mind is only for the cost of the services provided to our people .... [I]t is reasonable to assume that our people, our construction people would utilize the library .... They utilize the police protection .... or police services, fire services, whatever. Those services they do utilize during the time they are there, so the philosophy of impact aid is that the counties should be compensated for providing that service."

(Tr. p. 515)

The following construction period impact aid payments were made to affected Montana counties for the Townsend-Garrison property:

Powell County (1982, 1983, 1984, and 1985)	$ 61,410.00
Broadwater County (1982 and 1983)	29,570.00
Jefferson County (1982 and 1983)	64,895.00
Missoula County (1983, 1984, and 1985)	51,466.00
Granite County (1983, 1984, 1985)	98,100.00
Mineral County (1984 and 1985)	155,606.00

Post-construction period impact aid is available as a direct charge by affected Montana counties for any actual services which they might render to BPA. As Mr. Eskridge explained:

> "Say somebody tore out the fence, and we asked the county to have their local sheriff's office investigate that and try to find the person responsible. Well then they could bill us for that activity on our behalf and we would pay it. Another example would be a fire. Say we had a fire in one of our facilities and the local rural fire department responded to that fire. Well then they could bill Bonneville for that service and we would in turn pay for that."

(Tr. p. 525)

Mr. Eskridge noted that such occurrences were not very common. (Id.) BPA has not paid or been requested to pay any post-construction period impact aid to any affected Montana county.

4. Montana Intertie Agreement (See Plaintiffs' Exhibit 7)

a) General

The transmission lines from Broadview to Garrison are known as the Montana Intertie. (Tr. p. 72) Under the Transmission Agreement between the United States acting by and through BPA and the Montana Intertie Users (the Colstrip Owners – MPC, Pacific, Puget, PGE, and Washington Water), BPA agreed to construct, operate, and maintain the 500 kV lines from Townsend to Garrison and the Garrison substation. In addition, BPA agreed to provide firm transmission services over the Montana Intertie from Townsend to Garrison for the Colstrip Owners in amounts not to exceed the east-west transmission demands specified for each owner in Exhibit D of the agreement. Such Exhibit provides:

	Townsend-Garrison East to West Transmission Demands
MPC	390,600 kW
Puget	655,500
PGE	260,400
Pacific	130,200
Washington	195,300
Basin*	98,000
	1,730,000 kW

(*Basin Electric subsequently withdrew from the agreement. Its transmission demand was reallocated among the Colstrip Owners according to their percentage of the total east-west demand. (Tr. p. 864) Thus, under the Montana Intertie agreement, Colstrip Owners have a contract path from Townsend to Garrison. (Tr. p. 360) The Colstrip Owners have reserved all but 185 megawatts of east-west transfer capacity across the line for 22 years. (Tr. p. 378) According to Exhibit D, the Townsend-Garrison line would carry all the power output from Colstrip Units 3 and 4 owned by MPC, PGE, Pacific, Washington Water and Puget. All of Puget's share of power from Units 1 and 2 would also be transmitted over the Townsend-Garrison line. Approximately 1,730 megawatts of the Colstrip Owners' power is scheduled over the Townsend-Garrison line. (Exhibit D of Exhibit 7) The Colstrip Owners have contracted for over 90% of the firm transmission capability of the Townsend-

Garrison line.

For their part of the agreement, the Colstrip Owners agreed to construct, operate, and maintain the Broadview-Townsend transmission line and other such facilities needed to transfer power to Broadview. In addition, the Colstrip Owners agreed to provide firm transmission services over the Montana Intertie from Broadview to Townsend to BPA not to exceed the east-west transmission demands specified for BPA in Exhibit D beginning on the date when a 500 kV transmission line, connecting Garrison to the 500 kV portion of the Federal transmission system, first became available for power. (Such a line did not become available until 1986. (Tr. p. 407) Exhibit D provides:

Bonneville 185,000 kW

Neither BPA nor Western Area Power Administration exercised its east-west transmission capability during the years 1983-1985. (Tr. p. 407) Plaintiffs state that BPA is currently using its 185 megawatt reservation to transmit WAPA power from east to west. (Plaintiffs' Findings #28)

Colstrip Owners have contracted for firm transmission services. According to the agreement, firm transmission means BPA is required to accept the full scheduled amounts of scheduled power to the extent that the amounts do not exceed the transmission demands specified in Exhibit D. BPA has also contracted with each Colstrip Owner to deliver power from the Garrison substation over the FCRTS to each of the Plaintiffs' retail service areas. (See Exhibits 8, 12, 13, 14 and 15)

Nonfirm transmission service is service that could be interrupted at the discretion of the wheeling party. (Tr. p. 172) If BPA could find a party that would contract for nonfirm services, such services would benefit BPA. (Tr. p. 176) Mr. Brush had no knowledge of any nonfirm transmissions across the Montana Intertie. (Tr. p. 261) Only after 1986 was there nonfirm use. (Tr. pp. 328 and 329)

There is no west-east firm transmission service. (Tr. p. 324) Plaintiffs state that BPA has reserved all west-east transmission to itself. (Plaintiffs' Finding No. 29) At the time of the 1984 and 1985 assessments, DOR had no knowledge of any users of the Townsend-Garrison line other than the Colstrip Owners.

The term of the agreement is 22 years. However, the Colstrip

Owners have a right to renew the Montana Intertie Agreement in terms not less favorable than those originally agreed to, for a period of time not to exceed the duration of the Colstrip generation projects.

b) Payments for Use of Montana Intertie

After scheduling over the Montana Intertie commenced in October 1983, the Colstrip Owners became legally obligated to pay a monthly Intertie Charge to the BPA pursuant to the terms of the agreement irrespective of whether any Colstrip power was transmitted over the Townsend-Garrison transmission line. (Plaintiffs' Exhibit 7) The Intertie Charge represents payment by the Colstrip Owners for the entire east-west capacity of the Townsend-Garrison transmission line, except for the 185 megawatt reservation in favor of the government. It is computed upon the following formula:

$$\text{Intertie Charge} = \left(\frac{\text{Total Annual Costs}}{12 \text{ Months}} - \text{Non-firm Revenues}\right) \times \frac{\text{Capacity Requirement - Exchange Credit}}{\text{Total Capacity Requirement}}$$

Total annual costs of facilities associated with the Townsend-Garrison line is the total of 1) interest and amortization of associated Federal investment and the appropriate allocation of general plant costs, 2) operation and maintenance costs, 3) an allowance for BPA's general administration costs which are appropriately allocable to such facilities, and 4) impact aid payments. Total annual costs will be adjusted to reflect reductions to unpaid total costs as a result of any amounts received, under agreements for firm transmission service over the Montana Intertie, by the govenment on account of any reduction in transmission demand, termination or partial termination of any such agreement or otherwise to compensate BPA for the unamortized investment, annual cost, removal, salvage or other cost related to such facilities. Subtracted from total annual costs is the nonfirm transmission charge times the total nonfirm energy transmitted over the Townsend-Garrison line and the total nonfirm energy transmitted in either direction by the government over the Townsend-Garrison line. A customer's capacity requirement equals its transmission demand as set forth in

Exhibit D. The capacity requirement is reduced by the exchange credit. As compensation for the transmission services provided to BPA by any of the Colstrip Owners, beginning when a 500 kV line connecting Garrison to the 500 kV portion of the Federal transmission system first became available, BPA agreed to provide an exchange credit in the calculation of the Colstrip Owners' Intertie Charge. The computation of the exchange credit is complex. Lastly, the total capacity requirement is 1,915 kV.

C. THE BENEFICIAL USE TAX ASSESSMENT

Section 15-24-1203, MCA, provides as follows:

> "After March 17, 1969, there is imposed and shall be collected a tax upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation. No tax may be imposed upon the possession or other beneficial use of buildings owned by public entities and located upon public airports. However, privately owned buildings located on such airport property are subject to tax. No tax shall be imposed upon the possession or other beneficial use of public lands occupied under the terms of mineral, timber, or grazing leases or permits issued by the United States or the state of Montana or upon any easement unless the lease, permit, or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit, or easement relates. The tax shall be imposed upon the possession or other beneficial use of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax. The tax may not be imposed upon the possession or other beneficial use of railroad right-of-way or track acquired by the state pursuant to Title 60, chapter 11, part 1, as long as the state retains ownership and the right-of-way and track is used exclusively for rail transportation.

DOR prepared a beneficial use tax assessment for each of the Colstrip Owners' interest in the Townsend-Garrison 500 kV transmission line for tax year 1984. DOR used the unit valuation method in arriving at its assessment. The unit approach is applied to all centrally assessed property. (Tr. p. 848) Ms. Whittinghill testified that "that method is used because typically these companies are so thoroughly integrated that it would be hard to ascertain a value for the entire company as a whole, if you tried to go and piecemeal appraise each individual object that the company operates." (Tr. p. 848) The unit approach to valuation utilizes three indicators to obtain a value: the cost indicator, the income indicator, and the market or stock and debt indicator. (Tr. p. 848)

Through the cost indicator, DOR tried to get an idea of what the physical cost of the property would be (Tr. p. 853)

DOR determined that the cost of constructing the Townsend-Garrison line was $92,282,000. It made such determination as follows:

1.	Cost per mile of the Townsend-Garrison 500 kV transmission line (Defendants' Exhibit 1A, page 6 of attachment to Eskridge letter to Whittinghill)	$ 840,900
2.	Number of miles of Townsend-Garrison 500 kV line (Tr. p. 861-862)	95 miles
3.	Cost of line $840,900 x 95 miles (Tr. p. 861)	$ 79,885,500
4.	Cost of line as per first Exhibit D (Tr. p. 862)	$ 73,262,000
5.	Cost of line as per last revised Exhibit D (Tr. p. 862)	$ 123,698,000
6.	Cost of line relied upon by DOR	$ 92,281,833

($79,885,500 + $73,262,000 + $123,698,000) ÷ 3 (Tr. p. 862)

In order to determine the specific interest of each of the Colstrip Owners in the transmission line, DOR looked to the reserved transmission demands set forth in Exhibit D of the Montana Intertie

Agreement. (See p. 12 of this Opinion) The Department totaled the east-west transmission demands for all of the Colstrip Owners and then divided each owner's reserved transmission demand by the total transmission demand. (Tr. p. 864) The resulting percentage represented the reserved transmission capacity that each Colstrip Owner had in the Townsend-Garrison 500 kV transmission line. DOR then multiplied each Owner's percentage by the $92,282,000 cost of the line to arrive at each Owner's allocated cost of the Townsend-Garrison line, as follows:

Pacific	$92,282,000 x 8%	= $ 7,382,560
Puget	$92,282,000 x 40%	= $36,912,800
PGE	$92,282,000 x 16%	= $14,765,120
Washington Water	$92,282,000 x 12%	= $11,073,840
MPC	$92,282,000 x 24%	= $22,. 47,680

(See Defendants' Exhibit 1A)

The resulting allocated cost of the Townsend-Garrison line for each Colstrip Owner was then integrated into each owner's individual cost indicator by adding it to the cost of the owner's other operating property. For example, the cost worksheet of Pacific provides the following categories, of which the beneficial use assessment for the Townsend-Garrison line is only one (figures other than the beneficial use assessment have been deleted): (See Defendants' Ex. 1, p. 2)

	ORIGINAL COST	DEP. RESERVE	OCLD
PLANT:			
Colstrip #3			
Wyodak			
CWIP			
Libby Turbine			
Leased Equipment from others - BPA	$7,382,560	$7,382,562	
Materials & Supplies			(Tr. p. 868)
TOTALS			
ADJUSTMENTS: BPA			
CWIP			

Obsolescence

TOTALS

NON TAXABLE:

Licensed vehicles

TOTAL

The figures to be used for the worksheet would be obtained from the FERC Form 1 which the utilities file each year. (Tr. p. 867)

DOR also used the income indicator for purposes of valuing the operating properties of Pacific for 1984. (Tr. p. 871) Such indicator is used "to relate income and an overall rate to determine value." (Id.) The beneficial use assessment was not treated in the income indicator. Ms. Whittinghill testified that the Colstrip Owners' tax representatives agreed that the beneficial use assessment would be treated only in the cost indicator. (Tr. pp. 872, 1069-1071)

DOR also used the market or stock and debt indicator to value Pacific's properties but without including the beneficial use assessment. DOR then weighted the total cost indicator (of which the beneficial use assessment was part) by 40%, the total income indicator by 50%, and the total market indicator by 10%. (See Defendants' Exhibit 1, p. 3) Then DOR added the three weighted indicators plus the cost of work in progress to reach a total system value of $2,186,654 for Pacific in 1984. Such figure multiplied by the total of the owner's system value subject to assessment in Montana (for Pacific — .05954) resulted in $130,193 to be apportioned to each of the appropriate taxing jurisdictions as per administrative guidelines. Pacific's share of the cost of the Townsend-Garrison line based upon its transmission demand was $7,382,500.

DOR did not assess a beneficial use tax against any user of the Hot Springs to Idaho border portion of the 500 kV transmission line system, because BPA represented that there were no nonfederal users of that transmission line during calendar year 1983 and none of the Colstrip Owners reported any beneficial use interest in the transmission line for calendar year 1983. Other than the 500 kV transmission line extending from Townsend to Garrison, and the portion of the 500 kV transmission line extending from the Hot Springs substation to the Idaho border, there were no other 500 kV

transmission systems in the State of Montana which were otherwise tax exempt during calendar year 1983 and, thus, subject to beneficial use taxation.

DOR did not employ a valuation methodology which was based upon the amount of generation at the Colstrip facilities, the amount of electricity transmitted across the Townsend-Garrison 500 kV transmission line, the act of generating or producing energy at the Colstrip generating plants or the act of transmitting energy from the Colstrip generating plants. The BPA is not obliged, contractually under the terms of the Montana Intertie, to assume any portion of the beneficial use taxes which are levied and assessed against the Colstrip Owners. (Plaintiffs' Ex. 7, Ex. E)

D. HISTORY OF CASE

In mid-1984, DOR notified each Colstrip Owner of DOR's revised 1984 proposed ad valorem valuation of their Montana properties. The valuation included sums attributed to the Colstrip Owners' beneficial use of Townsend-Garrison transmission lines and associated facilities pursuant to Section 15-24-1203, MCA. (Agreed Facts filed September 19, 1986) Plaintiffs paid the tax and filed this cause of action requesting that such tax be refunded with interest.

OPINION

Plaintiffs' Complaint, alleging that the imposition of the beneficial use tax is illegal, sets forth seven counts. Three arise under the United States Constitution — violation of the Supremacy Clause, the Commerce Clause and the Fourteenth Amendment. Three counts involve state constitutional claims and the last claim involves Plaintiffs' beneficial use or lack thereof of the transmission lines.

Each claim is addressed separately below.

1. Supremacy Clause

A state cannot levy a tax directly against the government of the United States or its properties without the consent of Congress. M'Culloch v. Maryland, 4 Wheat 316, 4 L.Ed 579 (1819). However, a tax for the beneficial use of property, as distinguished from a tax on the property itself, has long been commonplace in this country.

Henneford v. Silas Mason Co., 300 U.S. 577, 587, 81 L.Ed 814, 818, 57 S. Ct. 524 (1937). Plaintiffs contend that they do not have possession or control of the 500 kV lines at issue, and therefore the beneficial use tax cannot be assessed against them. In support, Plaintiffs cite three cases: United States v. Detroit, 355 U.S. 467, 2 L.Ed.2d 424, 78 S.Ct. 474 (1958); United States v. Muskegon, 355 U.S. 484, 2 L.Ed.2d 436, 78 S.Ct. 483 (1958); and *Detroit v. Murray Corp.*, 355 U.S. 489, 2 L.Ed.2d 441, 78 S.Ct. 458 (1958). Although there was possession or control of the property at issue in the above cases, none of the decisions, which determined the constitutionality of a beneficial use tax, were based upon possession or control. Furthermore, the Supreme Court in U.S. v. Fresno, 429 U.S. 452, 50 L.Ed.2d 683, 97 S. Ct. 699 (1977) stated as follows:

> "These cases make it clear that a state may, in effect, raise revenues on the basis of property owned by the U.S. as long as that property is being used by a private citizen or corporation and so long as it is the possession or use by the private citizen that is being taxed." (Emphasis supplied)

Plaintiffs' first contention fails.

Secondly, Plaintiffs state that the tax must be set aside if it discriminates against the United States or those with whom it deals. U.S. v. Detroit, 355 U.S. 467, 2 L.Ed.2d 424, 78 S.Ct. 474 (1958). Plaintiffs assert that the beneficial use tax discriminates against them because it inflicts a larger burden on them than they would bear if they had constructed, operated, and maintained the lines themselves. (Trial Brief p. 18) In support, Plaintiffs argue that DOR has imputed to them the full cost of the lines even though they only use 90% of the east-west capability. Plaintiffs agreed, under the Montana Intertie Agreement, to pay the full cost of the lines in exchange for 90% of the east-west capability. (See p. 12 & 13 of this Opinion) Certainly, DOR could not be criticized if it did value the lines at the figure that Plaintiffs, in an arms-length transaction, agreed to pay for 90% of east-west transmission. But DOR did not use such figure. It used only 40% of the amount Colstrip Owners agreed to pay under the Montana Intertie Agreement in order to reach its assessment. (See p. 22 of this Opinion)

Plaintiffs also argue that they are discriminated against because

they were taxed upon the full cost of the line even though the duration of the Montana Intertie Agreement is only 22 years which is 61% of the estimated life of the lines. Again, Plaintiffs agreed to pay full cost for a 22 year contract. Secondly, Plaintiffs were not taxed upon full cost — but only upon 40% of full cost. Lastly, the Montana Intertie Agreement is renewable. (See Plaintiffs' Exhibit 7, p. 5) (See this Opinion at p. 15)

Plaintiffs' argument that they are discriminated against fails.

Thirdly, Plaintiffs argue that the United States Supreme Court in Fresno set forth three factors to determine the validity of a use tax. According to Plaintiffs, those factors are:

a) the legal incidence of the tax;

b) whether the tax is applied in a discriminating manner;

c) whether the tax was based on the total value of the federal interest or only the value of the taxpayer's possessory interest in the property.

Evidently with regard to the second factor, Plaintiffs argue that "because [the tax] is restricted to interstate high voltage 500 kV lines, [it] is structured and implemented so as to have maximum impact upon electric ratepayers residing outside of Montana." (Emphasis in orig.) Plaintiffs are mistaken. The tax is *not* resticted to interstate 500 kV lines. (See Section 12-24-1203, MCA; See p. 17 of this Opinion) It is restricted to lines of a design capacity of 500 kV or more. Other arguments raised by Plaintiffs with regard to the above factors have already been addressed.

Plaintiffs' fourth argument is that the beneficial use tax is statutorily preempted by Section 7(m) of the Regional Act, 16 USC § 839e(m) (1982) and also by § 212(a) of the Tax Reform Act of 1976. After carefully reviewing Section 7(m) of the Regional Act and Mr. Eskridge's testimony, this Court finds that impact aid authorized by that section is not in lieu of taxation. (See Section 7(m) attached to Plaintiffs' Trial Memorandum and Tr. pp. 470-581)

Plaintiffs also assert that the beneficial use tax is preempted by Section 212(a) of the Tax Reform Act. Such section provides for taxation of the generation or transmission of electricity. That is not at issue in this case. Defendants in this case have assessed a tax against Plaintiffs for their beneficial use of a 500 kV line. Plaintiffs argument is, thus, without merit. (See Plaintiffs' Reply Brief, pp. 9-10)

2. Commerce Clause

The parties agree that Complete Auto Transit v. Brady, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977) is applicable to this case. There, the United States Supreme Court stated that past decisions:

> "have sustained a tax against Commerce Clause challenge when the tax [1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and, [4] is fairly related to the services provided by the State."

Plaintiffs acknowledge that the location of the BPA transmission lines in Montana constitutes an activity "with a substantial nexus [between BPA and] the taxing State." However, Plaintiffs then argue that there is no nexus because BPA has been directed to make impact aid payments and because Plaintiffs do not own, possess, or operate the Townsend-Garrison lines. Plaintiffs do not elaborate on their argument. It goes almost without saying that Colstrip Owners' contractual right to transmit 1,730 megawatts of power across Montana is a sufficient nexus to the State of Montana.

Plaintiffs concede that the second criterion "is not particularly germane to the present situation" in both their Trial Memorandum and Opening Brief. (Trial Memo p. 36 and Opening Brief p. 54)

With regard to the third criterion, Plaintiffs argue that the beneficial use tax discriminates against interstate commerce in at least two ways. First, Plaintiffs argue that the tax is restricted to transmission facilities that are designed to have the maximum impact upon interstate commerce while exempting therefrom facilities which are designed and constructed to have a lesser impact upon interstate commerce. Plaintiffs are mistaken. The tax applies to the use of 500 kV lines. MPC, who serves mostly Montana consumers, is assessed in the same manner as PGE. The tax impacts intrastate and interstate users of 500 kV lines equally.

Secondly, Plaintiffs argue that the tax is being applied in a discriminating manner in that only the Colstrip Owners have been assessed. Plaintiffs state that Montana electric cooperatives "rely on the existence of the Hot Springs-Dworshak 500 kV line in order to obtain the power they sell to their Montana customers." (Em-

phasis supplied) (Opening Brief p. 56) Plaintiffs also state that "if the Colstrip Owners' arrangement with BPA with regard to the Townsend-Garrison lines constitutes 'beneficial use' so does the cooperatives reliance on BPA." (Opening Brief p. 56) The rural cooperatives may be relying on the BPA to provide power to them but they have no right to the lines. They are merely BPA's customers. By comparison, Colstrip Owners have a contractual right to transmit 1,730 megawatts of power across the Townsend-Garrison lines. The rural cooperatives have no such right.

Plaintiffs also argue that it is discriminating not to tax BPA's other customers for the 500 kV lines. The above discussion with regard to rural cooperatives holds equally true for BPA's other customers.

Lastly, Plaintiffs argue that the taxes bear no relationship to the services provided by the counties to Plaintiffs. However, in Commonwealth Edison v. Montana, 453 U.S. 609, 69 L.Ed.2d 884, 101 S.Ct. 2946 (1981), the United States Supreme Court held that it would not engage in a cost/benefit analysis when state taxes were challenged based upon the Commerce Clause. It stated:

> "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government — that it exists primarily to provide for the common good."

Commonwealth Edison at p. 897-898

3. Fourteenth Amendment

All Plaintiffs' fourteenth Amendment arguments have been addressed above.

4. Private Interests

Section 5(1)(a) of Article VIII of the Montana Constitution provides:

> "(1) The legislature may exempt from taxation:
> (a) Property of the United States, the state, counties, cities, towns, school districts, municipal corporations, and public libraries, but any private interest in such property may be taxed separately." (Emphasis supplied)

Based upon a committee comment, Plaintiffs argue that "private interest" is a legal right to physical possession or occupancy – i.e., the taxpayer must have a right to possess or occupy the property before the state may impose a tax upon it. (Trial Memo at p. 46) It is unnecessary to refer to committee comments as the section is clear on its face.

Colstrip Owners have a contractual right to transmit 1,730 megawatts of power across the Townsend-Garrison line. Such right is not a public right. It is Colstrip Owners' private right. Colstrip Owners do have a private interest and thus, may be subject to taxation.

5. Retrospective Laws

Based upon Article XIII, Section I, Clause 3 of the 1972 Montana Constitution, Plaintiffs assert that because they entered into the Montana Intertie Agreement in 1981 and the amendment to Section 15-24-1203, MCA was not enacted until 1983, they cannot be taxed. Plaintiffs have failed to support their contention in any substantial manner. The Court notes that if Plaintiffs were correct, all new forms of taxation would be prohibited.

6. Impairment of Contract

Article II, Section 31 of the 1972 Montana Constitution establishes that the State may not impair the obligation of contract. In their one paragraph addressing this issue, Plaintiffs argue that beneficial use tax impairs the Montana Intertie Agreement. Plaintiffs' argument is rejected pursuant to Bryne v. Fulton Oil Co., 85 Mont. 329, 278 P. 514 (1929) and Forbes v. Mid-Northern Oil Co., 100 Mont. 10, 45 P.2d 673 (1935).

7. Beneficial Use

Section 15-24-1203, MCA, is triggered by possession or beneficial use. Plaintiffs argue that they do not possess or beneficially use the line because they do not have concrete rights in and to the property. Based upon the record, it is clear that the Townsend-Garrison 500 kV line was built specifically to accommodate the interest of the Colstrip Owners. Plaintiffs have a clearly distinguishable use interest in the 500 kV line property from Townsend to Garrison. Plaintiffs' last claim fails.

Plaintiffs have not sustained their burden of proving that the imposition of beneficial use taxes pursuant to Section 15-24-1203, MCA, violates any statutory or constitutional rights. Therefore, this Court finds that such taxes have been lawfully imposed. Such taxes shall be disbursed from the protest accounts in which they are presently being held and shall be distributed as per Section 15-1-402, MCA.

IT IS SO ORDERED

DATED this 21st day of December, 1987.

DISTRICT JUDGE

pc:

No. 88-151

IN THE SUPREME COURT OF THE STATE OF MONTANA 1989

PACIFIC POWER & LIGHT COMPANY,
PUGET SOUND POWER & LIGHT COMPANY,
PORTLAND GENERAL ELECTRIC COMPANY,
WASHINGTON WATER POWER COMPANY,
AND THE MONTANA POWER COMPANY,
Plaintiffs and Appellants,

-vs-

MONTANA DEPARTMENT OF REVENUE,
et al.,
Defendants and Respondents.

APPEAL FROM: District Court of the First Judicial District, In and for the County of Lewis and Clark, The Honorable Henry Loble, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Donald R. Murray; Murphy, Robinson, et al., Kalispell, MT

Thomas H. Nelson; Stoel, Rives, Boley, Jones & Grey, Portland, Oregon

For Respondent:

Larry Schuster, Montana Department of Revenue, Helena, Montana

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Submitted: February 21, 1989
Decided: April 17, 1989

Mr. Justice L. C. Gulbrandson delivered the Opinion of the Court.

Appellants appeal the order of the First Judicial District Court, Lewis and Clark County, in a declaratory judgment action, upholding the validity of the Montana Department of Revenue's (DOR) assessment of beneficial use taxes for the year 1984 against the appellants pursuant to § 15-24-1203, MCA. These beneficial use taxes were assessed for the appellants' firm transmission demands upon certain Bonneville Power Administration (BPA), 500 kilovolt (KV) transmission lines located between Townsend, Montana and Garrison, Montana. We affirm the order of the District Court.

In the mid-1970s, two mine-mouth, coal-fired electric generating plants were built by Montana Power Company (MPC) and Puget Sound Power and Light Company (Puget), at Colstrip, Montana. Each of these plants produce 330 megawatts of electrical power consuming 30 megawatts internally at each plant. These plants have been operated and maintained by the Montana Power Company since being placed in service in 1975 and 1976.

To market the power produced by Colstrip Units I and II, two 230 KV electrical transmission lines were built to transmit the power from Colstrip to a point near Broadview, Montana. Other 230 KV lines moved the energy from Broadview to markets or "loads" located in western Montana and the Pacific Northwest. This system of 230 KV lines proved adequate for transmitting the energy generated from Colstrip Units I and II.

In the late 1970s and early 1980s, MPC and Puget, in conjunction with Portland General Electric Company (PGE), Washington Water Power Company (WWP) and Pacific Power and Light Company (PPL) foresaw an increased demand in the Pacific Northwest for electrical power. Consequently, they decided to build Colstrip Units III and IV. (Colstrip Units III and IV each have a generation capacity of 770 megawatts (MW) of electrical power with each plant consuming approximately 70 MW internally.) These five companies, the appellants in this case, were the owners of undivided interests in Colstrip Units III and IV at the time of the assessment of the beneficial use taxes which are the subject of this litigation. They shall hereinafter be collectively referred to as the Owners.

Realizing that the existing system of 230 KV transmission lines

would be insufficient to transmit the additional 1,400 MW produced by Colstrip Units III and IV in 1977, the Owners entered into negotiations with the BPA to build two 500 KV transmission lines from Townsend to the BPA's existing 500 KV lines at Taft, Montana.

The Owners would convert the existing 230 KV lines stretching from the Colstrip generating point to a substation located at Broadview, Montana, into 500 KV lines. They then would construct new 500 KV lines from Broadview, Montana to the anticipated BPA 500 KV lines beginning in Townsend.

For its part, the BPA executed two primary agreements with the Owners. These agreements stated the BPA would construct and operate those 500 KV lines referred to as the Montana Intertie line, which runs from Townsend, Montana to Garrison, Montana, and the Garrison West line, which runs from Garrison, Montana, to a point designated as the Taft substation on the Montana-Idaho border. These lines would link with the BPA's currently existing 500 KV system at the Taft substation.

In preparation for Colstrip Unit III going on-line in January, 1984, the BPA completed construction of the 500 KV lines from Townsend, Montana to Garrison. Montana, in 1983. There is no substation at the point where the BPA and Owners' lines meet near Townsend. The BPA completed the Garrison West line in 1986. This facilitated the transmission of Colstrip Unit IV power to the Taft substation and points to the west.

In 1983, the Montana Legislature, realizing use of the proposed BPA 500 KV lines extending from Townsend to Taft would be exempt from state property taxes, passed an amendment to § 15-24-1203, MCA, to close the loophole which provided this tax windfall. The amendment provides for the assessment of a beneficial use tax against users of exempt electrical transmission lines having a 500 KV or greater rating. After passage of this amendment, the DOR began meeting with the Owners, their representatives and the BPA to determine a value for the Montana Intertie line which would be placed in service in 1984.

A definite value for the Montana Intertie line had not been established by early 1984. The DOR thus based its assessment on the average of the initial agreement's project value and estimates of the actual cost of constructing these lines. The resulting value for the

Montana Intertie line was established at $92,000,000. The DOR then factored this value into the cost portion of the standard unitary method and assessed taxes to each owner based upon their firm transmission demands under the Montana Intertie Agreement. The Owners protested the imposition of these beneficial use taxes and this lawsuit resulted.

In 1985 and each subsequent year, the DOR has assessed beneficial use taxes against the Owners for their use of the 500 KV lines referred to in this opinion and in each case the Owners have protested and filed lawsuits seeking declaratory injunctive relief from the imposition of those taxes. The individual facts of those cases are not dealt with in this opinion.

The Owners present seven separate issues in this appeal:

1. Whether the Owners' lacked that sufficient "Beneficial Use" of the subject facilities necessary for the imposition of beneficial use taxes under § 15-24-1203, MCA?
2. Whether the challenged taxes violate the Commerce Clause of the United States Constitution?
3. Whether the challenged taxes violate the Supremacy Clause of the United States Constitution?
4. Whether the challenged taxes violate the guarantee of due process and equal protection found in the Fourteenth Amendment?
5. Whether the challenged taxes violate the "Private Interests" clause of the Montana Constitution?
6. Whether the challenged taxes violate the "Retrospective Laws" clause of the Montana Constitution?
7. Whether the challenged taxes violate the "Impairment of Obligation of Contracts" clause of the Montana Constitution?

BENEFICIAL USE

A state's right to impose beneficial use taxes on a private citizen or corporation's possession or use of property owned by the United States is well established. United States v. County of Fresno (1977), 429 U.S. 452, 462, 97 S.Ct. 699, 704, 50 L.Ed.2d 683, 692. However, these taxes must be imposed equally on others similarly situated. Id. at 462, 97 S.Ct. at 705, 50 L.Ed.2d at 692. The policy reason for allowing these taxes is to prevent the unfair trade advantage accruing to those private users of exempt properties over their competitors who must

pay ad valorem taxes on similar, privately held properties. Id. at 463, 97 S.Ct. at 705, 50 L.Ed.2d at 692-693.

The Owners maintain that the beneficial use taxes may not be imposed upon them as they do not have a beneficial interest in or receive a beneficial use from the 500 KV lines. They contend in order to impose beneficial use taxes the state must show that the Owners have possession of the exempt property and that this possession is exclusive, excluding other users of the lines and restricting physical access to the property. As evidence of their lack of possession or exclusive use, the Owners cite to the following facts. The maintenance and actual operation of the Townsend to Garrison 500 KV lines is controlled by the BPA. The BPA has reserved 185 MW of East to West transmission capacity unto itself and the Owners do not have access to the West to East transmission capacity over the Montana Intertie. Further, the testimony of experts at trial and in depositions established that it is impossible to identify the exact path that electrical power will follow when introduced into an integrated system such as exists between Colstrip and Garrison. In other words, one cannot identify whether the Owners' Colstrip power injected into the system at Colstrip flows over the 500 KV transmission lines or over other existing 230 KV transmission lines which interact with the 500 KV lines at the Broadview and Garrison substations.

We find, however, that the Owners do possess a sufficient beneficial use interest in the 500 KV lines, from Townsend to Garrison, which justifies the imposition of beneficial use taxes.

The United States Supreme Court has defined "beneficial use," in a case arising out of Missoula County, Montana, as follows:

> The expression "beneficial use" or "beneficial ownership or interest" in property is quite frequent in the law, and means, in this connection such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner or of someone on his behalf.

Montana Catholic Missions v. Missoula County (1906), 200 U.S. 118, 127, 26 S.Ct. 197, 200, 50 L.Ed. 398, 402. See also Harrison v. City of Missoula (1965), 146 Mont. 420, 407 P.2d 703. Further the

U.S. Court of Appeals for the Ninth Circuit has recognized a state may tax those contract rights granting such a beneficial use interest. International Paper Co. v. County of Siskiyou (9th Cir. 1974), 515 F.2d 285. In the International Paper Co. case the counties attempted to tax the companies' interest in standing timber located in national forests. Under the sale contracts, title to the timber remained with the Forest Service until it had been cut, scaled and paid for. The Ninth Circuit held that the timber property, from which the company derived profit, was not exempt from taxation merely because the United States retained legal title to it as security. *Id.* at 289, citing S.R.A., Inc. v. State of Minnesota (1946), 327 U.S. 558, 570, 66 S.Ct. 749, 756, 90 L.Ed. 851, 860.

In the present case, the Colstrip Owners have an enforceable contract interest which gives them the right to the beneficial use of firm (a guaranteed level of the available transmission capacity) megawatts of power transmitted over the Montana Intertie line. The Montana Intertie Agreement gave the Owners the right to inject electrical power into and remove electrical power from the lines up to specific maximum megawatts of power. This right is subject only to the BPA's ability to transmit these amounts onward from the Garrison substation. We note the project scheduled power, (the amount of electric power each company schedules on an hour over the Montana Intertie up to the maximum allowed for each Company's East-West transmission demand) remained under the ownership of the Owners.

The Owners have exercised this right and used these lines to transmit power for their own commercial profit-making activities. Further, absent the transmission of any BPA or non-firm energy, the Owners are responsible for the total annual cost of the lines. The total annual cost of the transmission lines includes the cost of the government's investment in the Montana Intertie line and the Garrison substation, the annual cost of operating and maintaining the transmission line system, the BPA's administrative costs attributable to the lines and the cost to BPA of any impact-aid payments. The payment formula provides that the Owners receive a credit for BPA and non-firm transmission over the lines. The Owners are liable for these payments whether they use the lines or not. Under such an arrangement, we find the Owners clearly have a beneficial use interest in the Montana Intertie 500 KV lines.

The Owners contend, however, that even if a beneficial use existed, the interest was not exclusive, and thus it could not be taxed. The Owners assert they have no reservation of the remaining 185 MW of East to West transmission capacity nor to any of the West to East transmission capacity of the lines. Therefore, the imposition of beneficial use taxes resulted in the Owners being taxed on the full value of the property when they only had use of part of the lines. United States v. County of Allegheny (1944), 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209.

This argument is without merit as the Montana Intertie Agreement provided that the BPA could not exercise its East to West reservation until the Garrison West 500 KV lines were operational. Thus, the BPA had no right to exercise its reservation in 1984, the year in which the taxes in this case were imposed. Secondly, testimony at trial established that the BPA would only allow reservation of a firm transmission demand on the West to East capacity of the lines if a requesting party showed a demonstrated need for use of the lines. Until such a demonstrated need was shown, the only firm transmission users of the lines were the Owners, for whom the lines were constructed, and the BPA.

Testimony at trial established that the Montana Intertie line consisted of two bi-directional 500 KV electrical transmission lines. These bi-directional lines are capable of transmitting electrical power in either direction, however, they are not capable of transmitting power in both directions simultaneously. These lines are stability limited at approximately 2,000 MW, although a BPA employee testified that actual loading of the system at capacity would be lower. In negotiating the Montana Intertie, the Owners and BPA provided for maximum firm transmission demands, East to West, of 1,915 MW. Further, the Owners' intention has been to operate the Colstrip generating units as base loaded units. Base loaded generating units are intended to run at full capacity supplying constant power levels to the system.

We find the Montana Intertie 500 KV lines were built to transmit base load power from East to West. No other parties could use the lines because of the Owners' reservation of more than the amount which could be transmitted beyond the Garrison substation. Until other parties are able to exercise reservations in the lines' transmis-

sion capacity in either direction, at which time the Owners will be credited, the Montana Intertie's total capacity was reserved exclusively to the Owners. Consequently, the State had the statutory right to tax the Owners based upon the full value of the facilities.

COMMERCE CLAUSE

Having found the Owners possessed a taxable beneficial use interest in the exempt facility, we now address the Owners' claims that the imposition of these taxes violated certain sections of the United States and Montana Constitutions. The Owners' first claim is that the imposition of beneficial use taxes on their use of the Montana Intertie line violated the Commerce Clause of the United States Constitution. The Owners contend that the Legislature intended to discriminate against interstate commerce by giving preferential treatment to Montana REA cooperatives and that the DOR has implemented the benefial use statute in a discriminatory manner.

It is well established that a state may raise revenues by taxing a private person or corporation's use of federal property within its jurisdiction, provided the state is taxing the possession or use of the property. United States v. County of Fresno (1977), 429 U.S. 452, 462, 97 S.Ct. 699, 704, 50 L.Ed.2d 683, 692. However, the fact that such a tax may have an impact on interstate commerce will subject the tax to commerce clause scrutiny. Commonwealth Edison Co. v. Montana (1981), 453 U.S. 609, 616, 101 S.Ct. 2946, 2952-2953, 69 L.Ed.2d 884, 893. A state may exact its fair share of the cost of state government from interstate commerce activities within the state, so long as the tax meets the test promulgated in Complete Auto Transit, Inc. v. Brady (1977), 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326. Commonwealth Edison, 453 U.S. at 617, 101 S.Ct. at 2953, 69 L.Ed.2d at 894. The Complete Auto Transit test requires, upon examination of the practical effect of the tax, that the tax be applied to an activity having a substantial nexus with the taxing state, be fairly apportioned, not discriminate against interstate commerce, and be fairly related to the services provided by the taxing state. Complete Auto Transit, 430 U.S. at 279, 97 S.Ct. at 1079, 51 L.Ed.2d at 331.

Applying this test to the facts in this case the Owners' activities, subject to the tax, had a substantial nexus to the State of Montana. They had exclusive contract rights to use approximately 90 miles of

BPA 500 KV transmission lines across Montana. These lines were constructed for the purpose of transmitting the Owners' electrical power generated at Colstrip, Montana to Garrison, Montana, and from there to the Owners' service loads. Further, as the Montana Intertie line is entirely within the state there is no potential for multiple state taxation of the use of the facilities. No other state would have jurisdiction to impose beneficial use taxes on these facilities. See, Commonwealth Edison, 453 U.S. at 617, 101 S.Ct. at 2953, 69 L.Ed.2d at 894.

Similar to the appellants in Commonwealth Edison, the Owners contend the tax assessed had a discriminatory effect on interstate commerce as the majority of the electrical power transmitted over these lines was destined for out-of-state consumers. These beneficial use taxes thus effectively exported the state's tax burden. However, as in Commonwealth Edison, the tax was computed at the same rate regardless of the destination of the power transmitted. MPC and Pacific used the power to service Montana customers and were assessed and taxed in the same manner as the other users of the lines. The fact the Legislature realized the brunt of the tax would fall upon out-of-state users of these lines would not invalidate the tax.

As stated by the United States Supreme Court:

> [M]otives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful (Citations omitted.) Least of all will they be permitted to accomplish that result when equity and not preference is the end to be achieved.

Henneford v. Silas Mason Co. (1937), 300 U.S. 577, 586, 57 S.Ct. 524, 528, 81 L.Ed. 814, 820.

The Owners also contend this amendment effectively discriminates against bulk transferors of power by benefiting local users of the federal transmission system and those utilities and cooperatives which use lower capacity transmission lines. In support of this contention the Owners point to the fact the amendment to the statute, § 15-24-1203, MCA, only applies to users of 500 KV and larger electrical transmission lines. However, state legislatures have a wide range of choice when they classify or limit items subject to taxation. Henneford, 300 U.S. at 587, 57 S.Ct. at 529, 81 L.Ed. at 821, citing Bell's Gap R. Co. v. Pennsylvania (1890), 134 U.S. 232, 237, 10 S.Ct.

533, 535, 33 L.Ed. 892, 895; Ohio Oil Co. v. Conway (1930), 281 U.S. 146, 159, 50 S.Ct. 310, 313, 74 L.Ed. 775, 781-782.

In the case at hand, the Legislature has identified a class of users of exempt property. This class consists solely of users of 500 KV and larger electrical transmission lines. These lines are used for the bulk transfer of electrical power. In this specific instance the Owners have contracted with the BPA to construct and operate 500 KV lines. As a result of the Owners' contract with the BPA, the Owners have the use of these lines which they otherwise would have been forced to construct themselves. Absent the implementation of the beneficial use tax, the Owners would have received the use of the Montana Intertie transmission facilities, essential to the sale of Colstrip generated power, free of the taxes they would be subject to if they had constructed the lines themselves. We do not find the effect of the legislation was to unfairly tax out-of-state users of the lines, rather the effect is to prevent all users of such exempt lines from unfairly reaping a tax windfall.

The Owners point to cases where the United States Supreme Court and Federal courts have found that state taxes discriminate against interstate commerce in favor of local businesses or consumers. However, these cases are distinguishable. In Boston Stock Exchange v. State Tax Comm'n (1977), 49 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514, the Supreme Court found a transfer tax on out-of-state sales of stocks violated the commerce clause. The Court found that no state "may 'impose a tax which discriminates against interstate commerce .... by providing a direct commercial advantage to local business.'" Boston Stock Exchange, 429 U.S. at 329, 97 S.Ct. at 607, 50 L.Ed.2d at 524, citing Northwestern States Portland Cement Co. v. Minnesota (1959), 358 U.S. 450, 458, 79 S.Ct. 357, 362, 3 L.Ed.2d 421, 427. In the case at hand, however, the beneficial use tax has been imposed upon both local and interstate users of the 500 KV lines for the purpose of eliminating a tax windfall and competitive advantage which enure to the users of tax exempt federal property. This tax imposes no greater tax liability on interstate users of these lines than on instate users. See Boston Stock Exchange, 429 U.S. at 332, 97 S.Ct. at 608, 50 L.Ed.2d at 526.

Recently in the case of United States v. City of Manassas, Va. (4th Cir. 1987), 830 F.2d 530, the Fourth Circuit Court of Appeals dealt

with a Virginia statute which taxed users of federally owned property, but exempted users of similar state owned property from taxation. There the court found the controlling case for discriminatory state use taxes is Phillips Chemical Co. v. Dumas School Dist. (1960), 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed.2d 384. In Phillips, the Court held such taxes must be examined based on "how other taxpayers similarly situated are treated." requiring "'an examination of the whole tax structure of the state.' Cf. Tradesmens National Bank v. Oklahoma Tax Comm'n, 309 U.S. 560, 568." Phillips, 361 U.S. at 383, 80 S.Ct. at 479, 4 L.Ed.2d at 389. The Phillips Court provided a two-part test for evaluating allegedly discriminatory state use taxes:

> 1) Are the users of federal property treated less favorably than similarly situated users of state property; and
>
> 2) If so, is that discrimination justified in light of the state and federal interest involved.

City of Manassas, 830 F.2d at 534. The Fourth Circuit Court of Appeals in City of Manassas, interpreted the justification in part two of the test as requiring a determination of whether the user of federal exempt property is similarly situated to a user of state exempt property. City of Manassas, 830 F.2d at 534.

At trial the only references to imposition of beneficial use taxes on state exempt property dealt with two short line railroads and the Great Falls Industrial Park. The Bureau Chief for the Intercounty Property Bureau testified that in 1986 the DOR determined these railroads qualified for imposition of beneficial use taxes under § 15-24-1203, MCA. She testified that those taxes were appealed to the State Tax Appeal Board, but that at the time of the trial, January 19, 1987, the railroads were still subject to beneficial use taxation. The Cascade County Assessor testified that the DOR had assessed beneficial use taxes on users of facilities at the Great Falls Industrial Park where the DOR found private parties' use met the requirements of § 15-24-1203, MCA. Neither party introduced any other beneficial use of similarly situated state exempt property, though several instances of beneficial use of other federal exempt properties were described. Based upon the above testimony we do not find the DOR discriminated against users of federal property in favor of similarly situated users of state exempt property.

Since the trial, the 1987 Legislature amended § 15-24-1203, MCA,

to exempt the beneficial use of railroad right-of-way and track acquired by the state through abandonment, provided the state retains ownership and the right-of-way and track are used exclusively for rail transportation. This amendment was not considered by the District Court in its order of December 21, 1987, and we find it is not properly before this Court on appeal. Hanley v. Dept. of Revenue (1983), 207 Mont. 302, 673 P.2d 1257.

The fourth prong of the Complete Auto Transit test questions whether the tax is fairly related to the services provided by the taxing state. In Commonwealth Edison, the Court found the "operating incidence" of the tax was on the mining of coal in Montana. As the tax was measured as a proportion of the value of the coal taken, it was in proper proportion to the appellant's activities in the state. The present case involves an "operating incidence" similar to Commonwealth Edison which falls upon the Owners' beneficial use of exempt electrical transmission lines found within the state. This tax is measured as a percentage of the value of the property in which the Owners possess their beneficial use interest.

> Because it is measured as a percentage of the value of the coal taken, the Montana tax is in "proper proportion" to appellants' activities within the State and, therefore, to their "consequent enjoyment of the opportunities and protections which the State has afforded" in connection with those activities. (Citations omitted.) When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'" (Citations omitted.)

Commonwealth Edison, 453 U.S. at 626-627, 101 S.Ct. at 2958, 69 L.Ed.2d at 900. As the appropriate level of that tax percentage is a legislative matter, we find the tax fairly reflects the taxpayer's activity in the state. Id. at 626-627, 101 S.Ct. at 2958-2959, 69 L.Ed.2d at 901.

SUPREMACY CLAUSE

The Owners' second claim is that the imposition of beneficial use taxes violated the supremacy clause of the United States Constitu-

tion. The Owners correctly assert there are two means by which a state tax may be invalidated under the supremacy clause. The state statute may be preempted by federal action or the tax may improperly place the legal incidence of the tax upon the property of the federal government.

The Owners contend that two federal statutes do in fact preempt Montana's imposition of beneficial use taxes upon private use of federally owned electrical transmission lines. The first is Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. § 391 (Anti-Discrimination Act) (1982). This statute provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

This statute has been examined in Arizona Public Service Co. v. Snead (1979), 441 U.S. 141, 99 S.Ct. 1629, 60 L.Ed.2d 106. There the Court examined New Mexico's tax on electrical generation and complimentary tax credit for electrical sales in New Mexico. The effect of this credit was to eliminate the 2 percent electrical generation tax for sales to New Mexico's electrical consumers, while taxing sales to out-of-state consumers. 15 U.S.C. § 391 (1982) was passed specifically to outlaw such taxes which place a greater tax burden upon electricity generated or transmitted in interstate commerce. The Court found that because the electrical energy tax indirectly discriminated against electricity sold outside the state, it violated the federal statute. Arizona Public Service Co., 441 U.S. at 150, 99 S.Ct. at 1634, 60 L.Ed.2d at 113. The federal statute does not prevent a state from taxing the generation and transmission of electricity, but only requires that interstate and intrastate generation and transmission be treated equally. *Id.* at 150-151, 99 S.Ct. at 1634, 60 L.Ed.2d at 114.

Initially, we note that no credit is provided under Montana's beneficial use tax to anyone affected by its imposition and none is alleged.

Further, the beneficial use tax on 500 KV electrical transmission lines applies equally to intrastate and interstate users of these lines. Testimony at trial established that Montana Power Company removed all of its power from the system at the Garrison substation for transmission to its load customers. MPC as an intrastate user is taxed at the same rate as the other users of the facilities. Also, this tax falls neither upon the generation nor the transmission of electrical power, but upon the use of tax exempt facilities. As such, this tax does not violate 15 U.S.C. § 391.

The Owners next contend 16 U.S.C. § 839(e)(m) preempts § 15-24-1203, MCA. This statute provides for the payment of impact-aid payments to offset the added cost to affected counties for the three construction phases of the Montana Intertie line. The three construction phases are pre-construction, which was complete before the Act was passed, construction, for which the three affected counties received over $150,000 in impact-aid payments, and post-construction. In the post-construction phase the counties may bill the BPA for any services provided as a result of the presence of the lines. The Owners' contention that these impact-aid payments were in lieu of taxes fails in light of testimony at trial. At trial, BPA's project information officer for the Colstrip transmission project testified that these impact-aid payments were not intended to be in lieu of taxes which the counties were losing as a result of federal ownership of the 500 KV lines. This statement is reinforced by U.S. Representative Dingell's statement contained in the environmental impact statement. 48 Fed. Reg. 55765. ("This is not a payment-in-lieu of taxes provision.")

The Owners also advance an implied preemption argument based upon a line of cases holding that preemption may be inferred when a scheme of federal regulation leaves no room for state regulation, or when the regulation is so dominant as to "preclude enforcement of state laws on the same subject." Hillsborough County v. Automated Medical Laboratories (1985), 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714. The argument fails, however, in light of our previous findings regarding statutory preemption. The impact-aid payments contained in 15 U.S.C. § 839(e)(m), do not preclude a state's right to levy taxes on a private party's beneficial use interest in exempt federal transmission facilities. Further, 15 U.S.C. § 391 only precludes the implemen-

tation of a state tax scheme which places a greater tax burden on generation or transmission of electricity placed in interstate commerce. As previously stated the Montana beneficial use tax is levied on the beneficial use of the facilities and is equally applied to interstate and intrastate users of the facilities.

The Owners' last supremacy clause argument is that the legal incidence of the beneficial use tax falls on the federal government. In order to find a state tax on use of such exempt properties unconstitutional under a legal incidence argument, the taxed entity must be "'so intimately connected with the exercise of a power or the performance of a duty' by the Government that taxation of it would be 'a direct interference with the function of government itself.'" United States v. New Mexico (1982), 455 U.S. 720, 736, 102 S.Ct. 1373, 1383, 71 L.Ed.2d 580, 593, citing James v. Dravo Contracting Co. (1937), 302 U.S. 134, 157, 58 S.Ct. 208, 219, 82 L.Ed. 155, 171. Where the legal incidence of the tax falls on a private party, and they are independent entities from the United States, the tax cannot be considered a tax on the government itself. U.S. v. New Mexico, 455 U.S. at 738, 102 S.Ct. at 1385, 71 L.Ed.2d at 594. In the New Mexico case, the government sought to show that beneficial use taxes, based upon management contracts which transferred payment of any state taxes imposed to the federal government, placed the legal incidence of the tax on the federal government. The United States Supreme Court found that the fact the federal property involved was being used for the government's benefit was irrelevant. *Id.* at 739, 102 S.Ct. at 1385, 71 L.Ed.2d at 595. The Court found the contractors remained "distinct entities pursuing 'private ends,' and their actions remained 'commercial activities carried on for profit.'" *Id.* at 739-740, 102 S.Ct. at 1385, 71 L.Ed.2d at 595, citing United States v. Boyd (1964), 378 U.S. 39, 44, 84 S.Ct. 1518, 1521-1522, 12 L.Ed.2d 713, 718. Such a tax does not fall upon the federal government, but rather upon the contractor's independent commercial enterprise.

In the instant case the tax is levied directly upon the Owners for their beneficial use of the federal government's facilities. There is no transfer of the tax liability to the government. In fact, the Montana Intertie Agreement provides any costs the government incurs by way of the Owners' use of these transmission lines are billable annually to the Owners The "legal incidence" of the beneficial use tax in this

case clearly falls upon the Owners and not upon the federal government.

The Owners argue that the imposition of these taxes on the Owners' use of the Montana Intertie line would adversely affect the government's ability to secure adequate lease fees from these types of lines. This argument must fail for two reasons. First, the United States Supreme Court has upheld use taxes even where the government by contract agrees to pay the state use or excise tax. See, James v. Dravo Contracting Co. (1937), 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155. Second, in the contracts which grant the use in this case, the Owners are obligated not only to pay the cost of operating and maintaining the lines each year, (less credits for BPA transmissions and non-firm transmissions), but the cost of constructing these lines as well. Under such an arrangement it is implausible that imposing these taxes upon the use of the exempt lines would adversely impact the government's ability to secure adequate lease values.

FOURTEENTH AMENDMENT

The Owners contend the imposition of beneficial use taxes in this case violates the Due Process Clause and the Equal Protection Clause under the Fourteenth Amendment to the United States Constitution. The Owners contend that the Due Process Clause requires that the amount of the tax must bear some relation to the value of the property assessed against the taxpayer. Norfolk & Western Railway Co. v. Missouri State Tax Commission (1968), 390 U.S. 317, 88 S.Ct. 995, 19 L.Ed.2d 1201. The Owners allege that the defendant counties have conferred no benefit upon the Owners because of their use of the Townsend to Garrison facilities, that the defendant counties have already been fully compensated through the impact-aid portions of the Montana Intertie Agreement and that the taxes imposed are based on the full value of the facilities. Further, the Montana Intertie Agreement gives appellants rights which are far less than full ownership.

State tax statutes will not normally be set aside based upon Due Process Clause violations, except in rare and unusual circumstances. A. Magnano Co. v. Hamilton (1934), 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109. Further, to attack the tax statute, the appellants must show a failure to satisfy two tests. First, the object of the tax must

lack a nexus with the state imposing the tax, and second, the tax must fail to fairly reflect the taxpayer's activity in the taxing state.

Sufficient nexus with the state has already been established under the Commerce Clause section previously discussed. Additionally, we previously found under the fourth prong of the Complete Auto Transit test, that the tax is fairly related to the services provided by the state. Thus, there is no violation of the Due Process Clause.

The Owners contend the Equal Protection Clause invalidates the beneficial use tax because the state has not equally administered the beneficial use taxes. Raymond v. Chicago Union Traction Co. (1907), 207 U.S. 20, 28 S.Ct. 7, 52 L.Ed. 78; and Larson v. State (1975), 166 Mont. 449, 534 P.2d 854. The Owners claim that the Department has never attempted to apply the beneficial use tax in analogous situations, specifically referring to the Montana Rural Electrification Administration Cooperatives (REAs).

These REAs, as preference customers, are entitled to purchase federal power at a preferred or "Priority Firm Rate." This rate is lower than the rate investor-owned utilities are entitled to when they purchase federal power. These REAs also have a right to first call on federal power, before investor-owned utilities. The Owners claim the beneficial use taxes would be applicable to BPA's preference customers based on their use of the BPA transmission system, including the BPA's 500 KV lines. The Owners also contend this is the first attempt to apply the beneficial use tax upon any entity that did not have "exclusive use" of the subject facilities. The Owners equate exclusive use to a requirement that they have possession of the facilities and transmission lines.

The standard which must be achieved to invalidate the tax on equal protection grounds is one of invidious discrimination, as opposed to the existence of a rational relationship. Lehnhausen v. Lake Shore Auto Parts Co. (1973), 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351. The existence of a rational relationship is met here by the intent to close the loophole which would have allowed these companies to avoid paying any taxes. In regard to the Owners' claims regarding the REAs, we note they do not use the Montana Intertie line, nor possess firm transmission demands in 500 KV lines which may be taxed in 1984, under § 15-24-1203, MCA.

We agree with the DOR that the Legislature was not required to

tax all beneficial users before it could reach the beneficial users of 500 KV lines. ("[T]axation of certain objects need not be universal in nature.") Citing to Louisiana v. Pilsbury (1881), 105 U.S. 278, 26 L.Ed. 109. The Legislature in this case has identified beneficial users of 500 KV lines as a distinct tax classification.

THE MONTANA CONSTITUTION

Additionally, the Owners claim the imposition of beneficial use taxes in this case violates three provisions of the 1972 Montana Constitution. The Owners contend that while Art. VIII, sec. 5(1)(a) allows "private interests" in exempt properties to be taxed separately, such a tax necessarily requires the user to have possession. The Owners base this requirement of possession upon statements made at the Constitutional Convention that in closing an existing loophole the delegates provided for taxation of private interests in government-owned property, "things like right-of-ways and things like that ...." Further, the Owners contend the Montana Supreme Court, in identifying an "interest" in real property as an estate, has implied one must have the right to possess and control property before beneficial use taxes may be imposed. Brown v. Hart (1984), 213 Mont. 517, 692 P.2d 14.

We disagree. What is involved here is a private contractual right to use a portion of the transmission capacity of the exempt Townsend-Garrison line. This private interest in exempt federal lands fits within the plain language employed by the 1972 Constitutional Convention delegates in closing this loophole contained in the prior constitution.

> (1) The legislature may exempt from taxation:
>
> (a) Property of the United States, the state, counties, cities, towns, school districts, municipal corporations, and public libraries, but any private interest in such property may be taxed separately.
>
> . . . .

Art. VIII, sec. 5(1)(a), 1972 Montana Constitution.

The Owners next claim that the imposition of beneficial use taxes on their use of the Montana Intertie line violates Art. XIII, sec. 1(3), prohibiting retrospective laws. Specifically the Owners contend that since the Montana Intertie Agreement was entered in 1981 and § 15-24-1203, MCA, was not amended to specifically include 500 KV

transmission lines until 1983, the effect of imposing these taxes is precisely the type of retrospective action the 1972 Constitutional Convention was prohibiting.

We find several problems with the Owners' argument. First, the argument ignores the ongoing nature of their use of these lines. Second, this contention is weakened by Art. VIII, sec. 5(1)(a) which specifically allows for taxation of the interests conveyed to the Owners under the Montana Intertie Agreement. We agree with the District Court that the position the Owners advance would have the effect of prohibiting all new forms of taxation. "The imposition of a new tax, or an increase in the rate of an old one, is simply one of the usual hazards of the business enterprise." Westfield-Palos v. City of Rancho Palos Verdes (Cal.App. 1977), 141 Cal.Rptr. 36, 42, citing John McShain, Inc. v. District of Columbia (D.C. Cir. 1953), 205 F.2d 882, 883.

> Only where the measuring formula for the tax draws upon such disparate or long past antecedents so as to have little relation to the volume of current business might a business license tax fall on retroactivity grounds. (Citations omitted.)

Westfield-Palos, 141 Cal.Rptr. at 42. We find that the beneficial use tax involved here, like the business license tax in Westfield-Palos applies to the ongoing, current business activity of the Owners. As such, the tax does not violate Art. XIII, sec. 1(3), of the 1972 Montana Constitution.

The Owners' final issue relies on Art. II, sec. 31, of the 1972 Montana Constitution in contending the imposition of these beneficial use taxes constitutes an impairment of their contract with the BPA. This argument is without merit as it has long been established that "[a] contract between individuals cannot have the effect of depriving the state or any municipal subdivision of any power of taxation otherwise belonging to it." Forbes v. Mid-Northern Oil Co. (1935), 100 Mont. 10, 22, 45 P.2d 673, 679, citing Newman v. Commercial Waterway District (Wash. 1923), 217 P. 9. As long as the state does not violate a fundamental right of the individual, the state is free to vary the existing mode of taxation. Forbes, 45 P.2d at 679. As Art. II, sec. 31 of the 1972 Montana Constitution is essentially identical to Art. 3, sec. 11 of the 1889 Montana Constitution, under which the Forbes

case was decided, we find the Owners have presented no reason to find there has been any impairment of their contract.

CONCLUSION

The Owners enjoyed a beneficial use interest in the Montana Intertie Agreement 500 KV lines, which use we hold was properly taxable under § 15-24-1203, MCA. That use was evidenced by the Owners' contractual reservation of firm transmission demands in the lines and the fact the lines were constructed for the purpose of transmitting the Owners' electrical power generated at the Colstrip generating facilities. The State's levy of these beneficial use taxes did not violate the United States Commerce Clause, the United States Supremacy Clause, the Fourteenth Amendment to the United States Constitution, nor the cited sections of the Montana Constitution. Therefore we affirm the order of the District Court.

_____

Justice

We concur:

_____

Chief Justice

_____

_____

_____

_____

_____

Justices

Supreme Court, U.S.
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No. 89-266

In The

Supreme Court of the United States

October Term, 1989

PORTLAND GENERAL ELECTRIC COMPANY,

Petitioner,

v.

THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA, et al.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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QUESTIONS PRESENTED

1. May the State of Montana constitutionally impose beneficial use taxes upon an investor-owned utility, for its use of 500 kv transmission line facilities in Montana, when such 500 kv transmission line facilities are reserved in favor of the investor-owned utility pursuant to a transmission agreement with the Bonneville Power Administration?

2. May the State of Montana constitutionally impose beneficial use taxes upon an investor-owned utility for its use of 500 kv transmission line facilities in the State of Montana, while recognizing that rural electric cooperatives are not similarly situated entities and that they do not use the 500 kv transmission line systems of the Bonneville Power Administration?

3. May the Legislature of the State of Montana constitutionally impose beneficial use taxes upon the use of 500 kv transmission line facilities, which are used for bulk power transfers of investor-owned utility power, thereby recognizing that lower voltage transmission line systems are not dedicated to such use?

4. May the State of Montana constitutionally impose beneficial use taxes upon entities which are users of 500 kv transmission line facilities in Montana and may it impose beneficial use taxes upon users of state owned tax exempt property?

5. May the State of Montana impose beneficial use taxes upon investor-owned utilities, as a result of their use of 500 kv transmission line systems, by relying upon the unit method of appraisal?

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

The Respondents, the Department of Revenue of the State of Montana, two Montana counties and their respective Treasurers, and the State Superintendent of Public Instruction, respectfully request that this Court deny the Petition for a writ of certiorari, seeking review of the decision of the Montana Supreme Court. That opinion is reported at *Portland General Electric Co. v. Department of Revenue*, ___ Mont. ___, 773 P.2d 1189 (1989).

OPINIONS BELOW

This case represents the second beneficial use tax case which was tried before the Honorable Henry Loble, District Judge for the First Judicial District, Lewis and Clark County, Montana. The opinion of the District Court appears at 13a of the Petitioner's Appendix. The opinion of the Montana Supreme Court appears at 21a of the Petitioner's Appendix. The first beneficial use tax case was tried before Judge Loble as well. *Pacific Power & Light Co. v. Department of Revenue*, No. 50978. The opinion appears at 29a of the Petitioner's Appendix. The decision in the *Pacific* case was affirmed by the Montana Supreme Court. Its decision appears at 51a of the Petitioner's Appendix.

The Petitioner herein, and four other Montana Colstrip owners, challenged the imposition of beneficial use taxes upon them in the *Pacific* case in 1984. They raised three constitutional claims which were founded upon the United States Constitution. All of the constitutional claims which Portland General Electric Co. (PGE) seeks to raise in this Court, were resolved by the Montana

Supreme Court in *Pacific Power & Light Co. v. Department of Revenue*, 773 P.2d 1176 (1989). The entire trial record, including transcripts and exhibits, as well as deposition testimony in the *Pacific* case, was incorporated by reference into the PGE trial.[1]

STATEMENT OF THE CASE

A. The Facts

The Montana Supreme Court set forth the foundational facts with respect to the use of the 500 kv transmission line systems in its opinion in the *Pacific* case. The interest of PGE in the 500 kv transmission line systems cannot be viewed in isolation. Its interest must be viewed in conjunction with the interests of the other four investor-owned utilities who planned, designed and own the Colstrip generating plants in Montana.

Rosebud County, Montana is the location of one of the largest coal-fired generating facilities in the United States. The generating facilities include four separate units, commonly identified as Colstrip Units 1, 2, 3, and 4. Colstrip Units 1 and 2 are jointly owned by Puget Sound Power & Light Co. (Puget) and by the Montana Power Co. (MPC). Puget is a Washington investor-owned utility, which has service territory in the Puget Sound area of Washington. MPC is a Montana investor-owned utility, which has service territory in Montana and a small service territory in Wyoming.

Colstrip Units 3 and 4 are jointly owned by five investor-owned utilities. Those investor-owned utilities

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[1] References in this Brief to the *Pacific* record are designated by the word *"Pacific"* appearing before the transcript citation. Accordingly, a citation to transcript page 77 of the *Pacific* case would appear in this Brief as *"Pacific* Tr. 77". The name of the witnesses providing the testimony follows the citation. A citation to an exhibit which was introduced in the *Pacific* case would appear in this Brief as *"Pacific* – Def. Ex. 43".

include PGE, Puget, MPC, Pacific Power & Light Co. (Pacific), and Washington Water Power Co. (WWP). Pacific is an Oregon investor-owned utility which has service territory in Oregon, Idaho, northwestern Montana, and Wyoming. WWP is a Washington investor-owned utility, which has service territory in the Spokane, Washington area.

Colstrip Units 1-4 produce 2,000 megawatts of net generation. The Colstrip plants represent the largest single source of coal-fired generation in the Pacific Northwest, other than the Jim Bridger generating plants in Wyoming.

Puget owns 50% of the net generation at Colstrip Units 1 and 2, or 300 megawatts. MPC owns 50% of the net generation at Colstrip Units 1 and 2, or 300 megawatts. MPC also owns 30% of the net generation at Colstrip Units 3 and 4, or 210 megawatts. Pacific owns 10% of the net generation at Colstrip Units 3 and 4, or 140 megawatts. WWP owns 15% of the net generation at Colstrip Units 3 and 4, or 210 megawatts. PGE owns 20% of the net generation at Colstrip Units 3 and 4, or 280 megawatts.

The five investor-owned utilities which own the Colstrip generating plants will be referred to in this Brief as the Colstrip owners. The Colstrip owners readily concede, and the Montana Supreme Court found, that they lacked adequate transmission line capacity in order to transmit their respective shares of Colstrip power from the Colstrip generating plants in Rosebud County, Montana, to their respective load centers, both within and outside the State of Montana.

During the early 1970's, the Colstrip owners retained the services of an independent consultant, in order to plan the 500 kv transmission line system from the generating plants to the Northwest. The history of the planning for the 500 kv transmission line system from the plants, across Montana, is aptly set forth in the Environmental Impact Statement prepared by the Bonneville Power Administration (BPA) during 1983. (Pacific – Def. Ex. 36).

In order to secure adequate transmission line capacity for their Colstrip power, the Colstrip owners engineered, paid for, and operate a 500 kv transmission line system from the Colstrip generating facilities to a point near Townsend, Montana. The use of that 500 kv system is governed by an agreement denominated as the Colstrip Project Transmission Agreement. (Pacific – Pl. Ex. 5). The transmission line system extends 114 miles between Colstrip and Townsend. (Resp. App. 12).

Recognizing that a 500 kv system was required for adequate transmission of Colstrip power across Montana, the Colstrip owners requested that the BPA design and construct a 500 kv system which would be complementary to the system which the Colstrip owners were constructing to a point near Townsend. The Colstrip owners' formal request to BPA was made during September 1977. (Pacific – Def. Ex. 44). BPA agreed to construct that transmission line system for the Colstrip owners. The transmission line system extends 90 miles between Townsend, Montana, and a substation at Garrison, Montana. It is commonly referred to as the Montana Intertie. The use of the Montana Intertie is governed by an agreement between BPA and the five Colstrip owners, denominated as the Montana Intertie Agreement. (Pacific – Pl. Ex. 7). The Montana Intertie was first energized during October 1983.

The use of the Montana Intertie and the imposition of beneficial use taxes was extensively examined by the Montana Supreme Court in the *Pacific* opinion.

At the time that the 500 kv system was being planned, the Colstrip owners recognized that there was a lack of transmission line capacity for Colstrip power east of the BPA Substation at Hot Springs, Montana. (Resp. App. 12). At the time the initial planning for the Colstrip transmission system was undertaken, BPA had a 500 kv system extending from its Hot Springs Substation in Montana to Dworshak, Idaho. The Hot Springs to Dworshak 500 kv system provided the then existing

"gateway" for transmission of Colstrip power to the Pacific Northwest from Montana.

> The Garrison-Spokane 500-kv Transmission Project is a proposal to build 500,000-volt transmission line facilities across western Montana and northern Idaho to the Spokane area in order to reinforce a section of the Bonneville Power Administration's electric power grid and to permit reliable integration of 1,240 megawatts of power produced by Colstrip Units 3 and 4, for use in Montana and throughout the Northwest. (Pacific – Def. Ex. 36, Pg. i).

After Colstrip Unit 3 was energized during October 1983, the Colstrip owners faced a severe limitation in their ability to transmit Colstrip power west of the Garrison Substation. The transmission line limitation was referred to by the Montana Supreme Court as the "bottleneck" in its *PGE* opinion. It was caused by the absence of a 500 kv system between the Garrison Substation and the Hot Springs Substation. In order to alleviate the lack of transmission line capacity, the Colstrip owners had requested that the 500 kv system be completed to Hot Springs. (Pacific – Def. Ex. 44). Bonneville complied with their request by constructing a 500 kv system from the Garrison Substation to the Taft Substation. The Taft Substation is an interconnection point on the Hot Springs to Dworshak 500 kv system. The Garrison to Taft 500 kv system extends 159 miles through western Montana. (Resp. App. 12). It was energized during October 1985. The Montana Supreme Court made specific findings with respect to the use of that transmission line system, for the transmission of Colstrip power, in its *Pacific* and *PGE* opinions.

In order to secure their rights in a transmission line system for their Colstrip power, the Colstrip owners entered into agreements with BPA which have been referred to as the "Garrison West Agreements". Each Garrison West Agreement secures specific transmission demands in Bonneville's 500 kv system in favor of a Colstrip owner. Those agreements, and the transmission

demands set forth therein, were the predicate for the imposition of beneficial use taxes upon the Colstrip owners, including PGE. The Garrison West Agreements are essentially leases, by which the Colstrip owners have reserved transmission line capacity in BPA's system.

Once the Garrison to Taft 500 kv system was completed, the full transmission demands set forth in the Garrison West Agreements, in favor of the Colstrip owners, could be fully accommodated. All Colstrip power generated and scheduled from Colstrip could be transmitted across Montana to the respective loads of the Colstrip owners, both within Montana and in the Pacific Northwest.

B. The Proceedings in State District Court.

Beneficial use taxes, pursuant to Mont. Code Ann. § 15-24-1203 (1983), were imposed upon PGE for its use of the Hot Springs to Idaho Border portion of the 500 kv system. PGE paid approximately $12,700 under protest to Mineral and Sanders Counties, representing the 1985 beneficial use taxes at issue. During a three-day trial before the District Court, PGE produced no power sales contracts by which Montana cooperative customers are served by BPA, nor did it call any witness from a cooperative who was knowledgeable about its operations and its relationship to the 500 kv system. On January 19, 1988, the District Court sustained the imposition of the beneficial use taxes upon PGE for the 1985 tax year.

REASONS WHY THE WRIT SHOULD BE DENIED

The Montana beneficial use tax statute passes constitutional muster under the applicable precedents of this Court. The jurisprudence regarding beneficial use taxation emanates from this Court's decisions in *United States v. County of Fresno*, 429 U.S. 452 (1977), and the trilogy of the 1958 Michigan beneficial use tax cases. The Montana Supreme Court properly applied this Court's decisions in

adjudging the constitutionality of Mont. Code Ann. § 15-24-1203. Beneficial use taxation of private users of federal property is settled law.

PGE has admitted that its Commerce Clause allegations must be measured against this Court's decision in *Commonwealth Edison v. Montana*, 453 U.S. 609 (1981). Last term, this Court held:

> *Complete Auto* abandoned the abstract notion that interstate commerce 'itself' cannot be taxed by the States. We recognized that, with certain restrictions, interstate commerce may be required to pay its fair share of State taxes.

D.H. Holmes Co. v. McNamara, ___ U.S. ___, 108 S.Ct. 1619, 1623 (1988).

The Montana Supreme Court correctly recognized that beneficial use taxation of 500 kv transmission lines was enacted by the Legislature in order to prevent a tax injustice. Owners of 500 kv systems in Montana are subject to property taxation. Mont. Code Ann. § 15-23-101. (Resp. App. 2). Before the 1983 amendment to Mont. Code Ann. § 15-24-1203, users of tax exempt 500 kv transmission lines in Montana would not have paid any taxes despite the design and operation of a 500 kv system expressly for their benefit. Since the Colstrip owners use the 500 kv system in order to transmit their private power for sale, both within and outside of Montana, they ought not to escape taxation based upon that use. *United States v. City of Detroit*, 355 U.S. 466 (1958), *United States v. Boyd*, 378 U.S. 39 (1964).

The Montana beneficial use tax statute does not infringe the Supremacy Clause. None of the beneficial use taxes which were levied upon the Colstrip owners, will be passed on to the United States. Neither the economic nor the legal incidence of the tax falls upon the United States. *United States v. County of Fresno*, supra. The United States has exhibited a lack of interest in this litigation. BPA and its counsel have been fully aware of this litigation for the past five years. The United States perceives

no threat through the imposition of beneficial use taxes upon the Colstrip owners.

Although Congress could act to preempt Montana beneficial use taxation, it has clearly refrained from doing so. Congress had the perfect opportunity to preempt Montana beneficial use taxes when it enacted the Northwest Electric Power Planning and Conservation Act of 1980. It deliberately elected not to preempt Montana beneficial use taxation.

The Montana beneficial use tax statute is applied so that interstate and intrastate users of the 500 kv system are treated in precisely the same fashion. There is no violation of the Anti-Discrimination Act. 15 U.S.C. § 391.

> The States have a very wide discretion in the laying of their taxes. . . . But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation.

Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526 (1959).

A. Background Factors Supporting Denial of the Writ.

The Colstrip owners, including PGE, are well represented in the legislatures of Oregon and Montana. During 1989, the lobbyists for the Colstrip owners successfully killed the proposed Oregon beneficial use tax legislation. The political process worked in favor of the Colstrip owners.

In Montana, the Colstrip owners' lobbyists vigorously resisted the amendment to Mont. Code Ann. § 15-24-1203 during 1983. A corporate officer appeared on behalf of MPC to testify against the legislation. (Minutes of the House Taxation Committee, March 1, 1983). A lobbyist on behalf of Pacific similarly appeared to oppose the legislation. (Minutes of the House Taxation Committee, March 1, 1983, and minutes of the Senate Taxation Committee, March 25, 1983). The Montana Legislature, in a bi-partisan effort, amended the statute to authorize beneficial use taxation of 500 kv systems.

PGE's assertion that it has been disenfranchised from the political process is without merit.

The beneficial use taxes which the Colstrip owners have paid under protest during the pendency of this litigation, are general revenue taxes. They will be utilized to provide services and to educate several generations of Montana school children. Without beneficial use taxation of 500 kv transmission lines, interstate commerce would be placed "in a privileged position". *Commonwealth Edison v. Montana*, supra.

PGE's assertion that it must be guaranteed access to the federal courts is not meritorious. Congress is perfectly capable of providing access to the federal courts. It has accorded concurrent jurisdiction to the federal District Courts and to the state courts over claims arising under the Railroad Revitalization and Regulatory Reform and Relief Act of 1976. 49 U.S.C. § 11503(c). (Resp. App. 10). Congress is capable of withholding access to the federal District Courts, for other entities which may be aggrieved as a result of state taxation. In enacting Section 532 of the Tax Equity and Fiscal Responsibility of 1982, Congress reserved tax claims of operating airlines for the state courts. 49 U.S.C. § 1513(b). (Resp. App. 11). Congress has not chosen to afford investor-owned utilities access to the federal District Courts, in contested tax cases, because there is no justification for doing so.

B. The Supremacy Clause: Montana Beneficial Use Taxes May be Imposed Pursuant to the Rule in *United States v. County of Fresno*. Congress Has Not Expressly Preempted Beneficial Use Taxation.

The recent cases decided by this Court conclusively establish that the Supremacy Clause is unavailable to PGE as a means to escape beneficial use taxation.

1. Under *United States v. County of Fresno*, Beneficial Use Taxes May Be Imposed Because PGE Uses the 500 KV Transmission Line System to Transmit Privately Owned Power.

PGE's reliance upon *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), is completely misplaced. The Court

has held that a taxpayer may not invoke the inter-governmental tax immunity doctrine unless it "actually stands in the government s shoes." *United States v. New Mexico*, 455 U.S. 720 (1981). Unless the legal incidence of a tax falls on the United States, the Supremacy Clause will not bar imposition of the tax. *United States v. County of Fresno*, 429 U.S. 452 (1977).

> The rule to be derived from the Court's more recent decisions, then, is that the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the state. This rule returns to the original intent of *M'Culloch v. Maryland*.

Id. at 462-463.

In order for a use tax to withstand constitutional scrutiny, it is not necessary that the federal property be exclusively in the possession of the taxpayer.

> These cases make clear that a State may, in effect, raise revenues on the basis of property owned by the United States as long as that property is being used by a private citizen or corporation and so long as it is in the possession or *use by* the private citizen that is being taxed.

Id. at 462.

In *County of Fresno*, the United States contended that Forest Service employees did not occupy the residences of the United States pursuant to any formal written leases. It argued that the interest of the Forest Service employees was akin to a license. The Court rejected that argument finding that a "beneficial personal use . . . " was sufficient to sustain imposition of California's possessory use tax. Id. at 467.

Montana's beneficial use tax statute squares perfectly with the *County of Fresno* rule.

> The tax shall be imposed upon the possession *or other beneficial use of an electric transmission line* and associated facilities, except the lines

> and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax. Mont. Code Ann. § 15-24-1203 (1983).

The beneficial use in favor of PGE is manifestly evident from the record and from the opinions of the Montana Supreme Court in *Pacific* and *PGE*. The instrument by which PGE is able to transmit its Colstrip power over the Hot Springs to Idaho Border 500 kv system, elevates its use interest above the nature of the use interest which was found sufficient in *County of Fresno*. PGE's Garrison West Agreement secures substantial rights in the 500 kv system to PGE. It has a right to the capacity of the transmission line for Colstrip power. Colstrip power is power owned by PGE. The transmission demands under the Agreement are firm transmission demands. PGE has a continuous right to uninterrupted use of the transmission line system west of Garrison. It must have such firm use, in order to provide safe and reliable service to its customers. During trial, no other entity was demonstrated to have any firm transmission capacity in the 500 kv system west of Garrison. PGE has no other transmission contract, by which its Colstrip power can be transmitted west of the Garrison Substation. (PGE – Kirby Tr. Pgs. 217-218). PGE pays for the use of the transmission line system. The charge includes amortization of the 500 kv system, the cost of labor, operations, maintenance, and interest on the federal investment. The duration of the Agreement is coextensive with the life of the coal plants at Colstrip. In the event that BPA cannot provide transmission line capacity in order to satisfy the firm demands, it has an obligation to provide replacement power to PGE. PGE is responsible for the line losses associated with transmission of Colstrip power. It has 280 megawatts of Colstrip power. It has 270 megawatts of transmission demand under the Agreement. Before the 500 kv system was completed from Garrison to Taft, PGE could only transmit 65 megawatts of its Colstrip power west of Garrison. As found by the Montana Supreme Court, PGE must pay for its reserved transmission demands, even though none of

its power may be flowing over the transmission line system. In light of these facts, PGE's Garrison West Agreement with BPA is essentially akin to a leasehold interest. An engineer witness for Pacific testified that firm transmission contracts are akin to leases. (Pacific – Hammerquist Depo. Pgs. 82-83).

PGE's Garrison West Agreement secures to it a use interest in the 500 kv lines which is at least as substantial as the lease which formed the predicate for beneficial use taxation in *United States v. City of Detroit*, supra. In *United States v. Township of Muskegon*, 355 U.S. 484 (1958), this Court sustained the application of Michigan's beneficial use tax statute against a permittee, which was utilizing federal property in order to perform a contract with the United States government.

> The vital thing under the Michigan statute, and we think permissibly so, is that Continental was using the property in connection with its own commercial activities.

Id. at 485.

Significantly, this Court sustained the application of Michigan's general personal property ad valorem tax statute, against a federal contractor which was performing work on behalf of the United States government. *City of Detroit v. Murray Corp.*, 355 U.S. 489 (1958).

The reliance on *United States v. Hawkins County, Tennessee*, 859 F.2d 20 (6th Cir. 1988) cert. denied, 109 S.Ct. 1638 (1989), is misplaced. The case is distinguishable from the present case. The *Hawkins* case certainly must pale in comparison with *United States v. Boyd*, supra. This Court sustained application of Tennessee's tax statute against two private corporations which were using the Oakridge facility, in order to perform their contracts with the United States.

The dominant commercial motive of PGE and the Colstrip owners in ordering and reserving the 500 kv system is a fundamental basis for sustaining the tax. Under the rule in *United States v. County of Allegheny*, the use of the property is paramount in grounding the tax.

> . . . His personal advantages from the relationship by way of salary, profit or beneficial personal use of the property may be taxed as we have held.

United States v. County of Allegheny, 322 U.S. 174, 188 (1944).

The Montana Supreme Court placed great reliance upon this Court's decision in *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906). The use interest of PGE in the 500 kv system from Hot Springs to Idaho is more substantial than an equitable interest. It is a significant enforceable right in favor of PGE. It is a right which is far more substantial than the contractual rights to enter property and to cut timber which were the predicates for successful beneficial use taxation in *International Paper Co. v. County of Siskiyou*, 515 F.2d 285 (9th Cir. 1974).

PGE is accustomed to use taxation based upon its non-possessory interests in federal property. *Portland General Electric Co. v. State Tax Commission*, 437 P.2d 827 (1968).

Various state courts have sustained beneficial use taxes, when the user converts federal property to a private commercial purpose. *Great Salt Lake Minerals & Chemical Corp. v. State Tax Commission*, 573 P.2d 337 (1977), *United States v. State of Nevada*, 493 P.2d 1324 (1972).

The beneficial use taxation of a reserved interest in a 500 kv system, is simply a modern application of a very traditional rule.

2. Congress Did Not Preempt Montana Beneficial Use Taxation When it Enacted 15 U.S.C. § 391.

PGE's reliance upon 15 U.S.C. § 391 is misplaced for several reasons. Congress specifically targeted the statute at the New Mexico electrical energy tax. The tax statute

was discriminatory on its face, because it provided a credit for in-state consumers of electrical energy while denying any credit or offset for out-of-state consumers. *Arizona Public Service Commission v. Snead*, 441 U.S. 141 (1979). The Montana beneficial use tax statute is facially neutral. It applies to intrastate users as well as interstate users of the 500 kv system.

PGE clearly misreads this Court's cases with respect to tax burdens and their constitutional significance.

> Instead, the gravamen of appellants' claim is that a state tax must be considered discriminatory for purposes of the Commerce Clause if the tax burden is borne primarily by out-of-state consumers. Appellants do not suggest that this assertion is based on any of this Court's prior discriminatory tax cases . . . Consequently, to accept appellants' theory and invalidate the Montana tax solely because most of Montana's coal is shipped across the very state borders that ordinarily are to be considered irrelevant would require a significant and, in our view, unwarranted departure from the rationale of our prior discrimination cases . . . As previously noted, there is no real discrimination in this case; the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers.

Commonwealth Edison v. Montana, 453 U.S. 609, 618-619.

PGE's Petition similarly reveals a paucity of authority in support of its contention that out of state consumers have been discriminated against through imposition of beneficial use taxes.[2]

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[2] The United States Congress had an opportunity to expressly preempt beneficial use taxation when it enacted the Pacific Northwest Electric Power Planning and Conservation

(Continued on following page)

C. The Commerce Clause: Montana's Beneficial Use Taxes Do Not Discriminate Against Interstate Commerce.

In *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), the Court held that

> . . . interstate commerce may be made to pay its way, and has moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology.

Id. at 281.

> A state has a significant interest in exacting from interstate commerce its fair share of the cost of state government.

Commonwealth Edison v. Montana, 453 U.S. 609, 616 (1981).

The purpose of the beneficial use tax statute is not in doubt. It was designed to ensure that a tax windfall would not enure to users of 500 kv systems. *Pacific Power & Light Co. v. Department of Revenue*, 773 P.2d 1176, 1179. In Montana, investor-owned utility property, including 500 kv systems, is subject to ad valorem taxation. Mont.

(Continued from previous page)

Act of 1980. The legislative history reflects that Congress elected not to provide any system of "in lieu tax payments." Instead, Congress elected to provide a system of limited "impact aid payments" as a result of the presence of transitory construction personnel. Since the construction of the Hot Springs to Idaho Border portion of the 500 kv transmission line system preceded enactment of the Northwest Act, no impact aid payments have been made to Mineral or Sanders County.

PGE concedes the fallacy of its argument at footnote 13 page 11 of its Petition.

BPA's Montana District Manager, Mr. Eskridge, testified that he was responsible for implementing the impact aid provisions of the 1980 Act in Montana. During trial, he testified that BPA had no intention to provide a system of "in lieu tax payments" when it instituted its impact aid policy in Montana. (Pacific – Eskridge Tr. Pg. 538).

Code Ann. § 15-23-101. (Resp. App. 2). PGE pays property taxes on its 500 kv system from Colstrip to Townsend, Montana. But for the amendment to Mont. Code Ann. § 15-24-1203, PGE would have paid no taxes to Montana although it will have an unfettered and clear right to use the 500 kv system of BPA for nearly half a century. The Montana tax is an equivalency tax, to ensure that the State does not lose the revenue which it would otherwise secure if the 500 kv system were privately owned. This is precisely the rationale upon which Louisiana's use tax was sustained in *D.H. Holmes Ltd. v. McNamara*, supra.[3]

PGE's reference to *New Energy Co. of Indiana v. Limbach*, ___ U.S. ___, 108 S.Ct. 1803 (1988) is self-defeating. The Colstrip owners, including PGE, have no out of

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[3] Representative Marks introduced the amendment to Mont. Code Ann. § 15-24-1203 during 1983. His testimony is instructive.

> The tax exempt property that the sponsor of the bill is specifically interested in is the Bonneville Power line that runs across several counties in Montana. That power line hooks onto privately owned power lines. The plan will take the power line through a number of counties. The Bonneville Power Administration, through an amendment on an appropriation bill in Congress, received authority to come through the eastern side of the continental divide and build a line that could be hooked up to Colstrip 3 and 4. The counties that the power line went through did not receive any benefit from the construction of that line. No payment in lieu of taxes was given, except on rare occasions and that was just on a onetime [sic] basis. House Bill 747 would impose a privilege tax. It is unfair for government owned power companies to come in and compete with privately owned power companies. *If the power line would have been privately owned, the counties would have received taxes off that line.* (Minutes of the House Taxation Committee, March 1, 1983).

state competitors in Montana. They are the investor-owned utilities which produce power in Montana and they transmit it to their respective loads, both in Montana and outside of Montana. Montana Power Company, and its consumers and ratepayers, are accorded the same treatment under the statute that the Oregon and Washington utilities receive.[4]

PGE conceded in its Brief to the Montana Supreme Court that the nexus element under *Complete Auto Transit v. Brady*, supra, was not at issue. (PGE Brief, Pg. 18). It has now changed its position. Nevertheless, its contention is untenable. PGE has the unfettered right to drive 280 megawatts of Colstrip power across a 500 kv system, which extends 350 miles across Montana, for a period of 21 years. Without use of the 500 kv system, Colstrip Unit 3 and 4 could not be operated at their rated capacities. (Pacific – Brush Tr. Pg. 240). If the 500 kv system is unavailable, PGE's investment in Colstrip Units 3 and 4 is largely valueless. "There is nexus aplenty here." *D.H. Holmes Co. v. McNamara*, 108 S.Ct. 1619, 1624 (1988).

PGE's own engineering witness, Mr. Mikolaitis admitted that without use of the Hot Springs to Idaho Border 500 kv system, the transmission line capacity for

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[4] Montana is fulfilling its responsibility to supply energy to the Nation. As noted in *Commonwealth Edison v. Montana*, (Dissenting opinion of Justice Blackmun), 25% of the proven coal reserves in the United States are in Montana. In order to facilitate this coal development, Montana provides a tax incentive for "new industry". Mont. Code Ann. § 15-6-135. (Pet. App. 11a). The Colstrip owners enjoyed this tax incentive as a result of their development of the Colstrip generating plants. *Department of Revenue v. Puget Sound Power & Light Co.*, 179 Mont. 255, 587 P.2d 1282 (1978). Puget's Montana ad valorem taxes were reduced by 75% for three years after development of the plants. PGE received the same tax benefit as a result of its investment in Colstrip Units 3 and 4.

purposes of satisfying its Garrison West transmission demands, would be "severely limited". (PGE – Mikolaitis Tr. Pg. 77). He also admitted that the split of power at the Hot Springs Substation will be substantially in favor of the 500 kv line from Hot Springs to Dworshak, because it presents the path of least impedance to the flow of power. (PGE – Mikolaitis Tr. Pg. 78). PGE's Garrison West Agreement reflects that its transmission demands were severely limited until the 500 kv system was completed to the Hot Springs Substation. (PGE – Mikolaitis Tr. Pg. 62). Every engineering witness considered the Hot Springs to Idaho Border portion of the 500 kv system to be an integral portion of the capacity necessary to transmit Colstrip power.

In analyzing the Commerce Clause decisions of this Court, affecting state taxes, one commentator has written . . . The effect of these decisions has been to recognize "a commerce clause jurisprudence rooted in practical economic consequences of state taxes . . . " Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 The Tax Lawyer 37, 70 (1987). The practical economic consequence of the Montana beneficial use tax is that it plugs a loophole. Users of 500 kv systems should not escape taxation. Since Montana's beneficial use tax statute satisfies each element set forth in *Complete Auto Transit v. Brady*, supra, it is not constitutionally objectionable.

1. Montana Tax Statutes Do Not Discriminate Against Interstate Commerce.

The Montana tax statutes provide for a classified system of property taxation. The purpose of such a tax classification system is to ensure that various types or classes of property are taxed according to their use, productivity, and general economic setting in society. *Department of Revenue v. Montana Stockgrowers Ass'n*, ___ Mont. ___, ___ P.2d ___, 46 St. Rep. 1132 (1989). Such tax classification systems have been uniformly sustained against equal protection and commerce clause challenges.

Nashville C. & St. L. Ry. Co. v. Browning, 310 U.S. 362 (1940), *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

a. The Montana Legislature Appropriately Enacted a Beneficial Use Tax Statute For 500 KV Transmission Line Systems.

BPA and the Colstrip owners have acknowledged why the 500 kv system was constructed in Montana. BPA set forth a specific rationale for construction of the 500 kv system in Montana in its Environmental Impact Statement. It was denominated "Garrison-Spokane 500-kv Transmission Project" (March 1983).

> To transmit the additional Colstrip power reliably and efficiently, the existing Federal Columbia River Transmission System must be reinforced. Two 500-kv transmission lines will cross the State to western Montana so that power may be so integrated. At the request of the Colstrip Project Applicants, Bonneville has agreed to build part of the Colstrip integrating transmission system. . . . Successful integration into Bonneville's system will require reinforcement of part of the Federal system and extension of the main 500-kV electrical grid to the vicinity of Garrison, Montana. Without adding 500-kV transmission facilities to BPA's power grid, the existing transmission system would not be viable for transmitting the output of Unit 4, and would not form a reliable intertie to transmit the scheduled 1,240 MW of energy to Northwest users. (Pacific – Def. Ex. 36, Pgs. I-10 through I-11).

The engineering witnesses were agreed that the 500 kv system was necessary in order to successfully transmit Colstrip power across Montana. Dr. Heydt, Professor of Electrical Engineering at Purdue University, testified that the 500 kv system was necessary in order to transmit Colstrip power across Montana.[5] (Pacific – Heydt Tr. Pgs.

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[5] Dr. Heydt is the Respondents' electrical engineering expert witness.

666-667). Mr. Brush, MPC's engineer, testified that most of the Colstrip power flowed over the 500 kv system. He had that knowledge because he had run power flow studies in order to determine that fact. (Pacific – Brush Tr. Pg. 268). Mr. Brush was also able to state that the actual flow of power over any transmission line system is governed by the relative impedance of the system. (Pacific – Brush Tr. Pg. 218). Mr. Porter, of BPA, agreed that a 500 kv system will accommodate approximately 4.7 times more power than a 230 kv system. (Pacific – Porter Tr. Pg. 56). All of the engineering witnesses agreed that the power flow in the 500 kv system across Montana is controlled by setting the generation levels at the Colstrip plants. (Pacific – Tr. Pgs. 252, 367, 681-682). The Colstrip units are operated as base loaded units. They continuously supply 2,000 megawatts of power to the 500 kv system. (Pacific – Brush Tr. Pg. 255). Mr. Mikolaitis, of PGE, admitted that if the Hot Springs to Idaho Border portion of the 500 kv system was out of service, there would be insufficient transmission capacity to accept the firm 330 megawatts of limited transmission demand allocated to the Colstrip owners before the Garrison to Taft lines were completed. (PGE – Mikolaitis Tr. Pg. 77). The power split into the 500 kv system at the Hot Springs Substation is pronounced, because it provides the path with the least impedance to the flow of power. (PGE – Mikolaitis Tr. Pg. 78). If the Hot Springs to Idaho Border 500 kv system did not exist, the limited transmission demands in favor of PGE could not be accommodated. In Mr. Mikolaitis' words, the transmission capacity "would be severely limited". (PGE – Mikolaitis Tr. Pg. 92).

Since the Colstrip owners have admitted that the 500 kv system is critical to the transmission of their Colstrip power, they have provided a sufficient basis for the Montana Legislature to separately classify their use interests. Utilities with the right to use public property may be treated as a separate class for taxation purposes. *New York Rapid Transit Corp. v. New York*, 303 U.S. 573 (1938).

b. Montana's Tax Classification Scheme is Constitutionally Sound.

PGE attempts to denigrate Montana's tax classification system by suggesting that the property of cooperatives must be taxed at the same rate as the property of investor-owned utilities. Its argument is a veiled equal protection argument. It has been rejected by this Court since the late 1800's.

The cooperative customers of BPA are singularly distinctive from investor-owned utilities. The facts supporting that distinction will be set forth in section 3a of this Brief.

The equal protection clause is not infringed by taxing one class of property while leaving another class untaxed. *Broad River Power Co. v. Query*, 288 U.S. 178 (1933). A state has a wide choice in classifying the subjects of taxation. *Bell's Gap Railway Co. v. Pennsylvania*, 134 U.S. 232 (1885). It may select the objects and purposes of taxation, from among the spectrum of property in the State. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937). " . . . [T]he states have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lakeshore Auto Parts Co.*, 410 U.S. 356, 359 (1973).

c. The Montana Legislature Recognized the Impact of 500 KV Transmission Line Systems by Amending Mont. Code Ann. § 15-6-141 During 1981.

PGE makes an argument concerning an eventuality. During 1981, the Montana Legislature amended Mont. Code Ann. § 15-6-141, by adding the following language:

> (a) centrally assessed electric power companies' allocations, including allocations of properties constructed, owned, or operated by a public agency created by the congress to transmit or distribute electric energy produced at privately owned generating facilities (not including rural electric cooperatives).

Congress has not enacted legislation allowing any state to tax the property of a public agency, including BPA. PGE bases its argument upon an expectancy, which is not the law in Montana. For that reason, its argument should be summarily dismissed.

The rationale for the amendment to Mont. Code Ann. § 15-6-141 is apparent from the legislative history.

> Congress has granted the BPA the authority to go east of the Continental Divide, which they hadn't been able to do until about a year ago. Congress has tried to put legislation similar to HB 36 into law . . . Then BPA arrived on the scene and this upset the people. If a private utility wants the power lines, they have to pay taxes, and these power lines won't be taxed. The Congressional delegation introduced a bill which would provide for a tax, but that portion of the bill was taken out. Montana was asked to introduce a bill on the state level and thus HB 65 was drafted. Maybe then, this type of legislation would have a better chance on the federal level. BPA is using these lines to go back to the private lines, and this isn't justifiable. All the big corporations are going to use this electricity and Montana should get some tax dollars in return. This is the first of many lines that will traverse the state, and we should get a handle on this situation before we lose the power to do anything. (Minutes of the House Taxation Committee meeting, January 21, 1981).

The Montana Legislature has consistently recognized that the property of cooperatives is not comparable to the property of investor-owned utilities. The two separate types of properties have been separately classified for many years. Such classifications are constitutionally permissible. *Mueller v. Allen*, 463 U.S. 388 (1983).

d. Montana's Beneficial Use Tax Statute Does Not Discriminate Against Users of Federal Property.

PGE has consistently misrepresented the tax statute at issue. It cites to Mont. Code Ann. § 15-24-1203 (1987). This tax controversy arose when beneficial use taxes were imposed upon PGE, during 1985. The taxes were predicated upon Mont. Code Ann. § 15-24-1203 (1983). (Resp. App. 1). The 1987 amendment referred to by PGE did not become effective until October 1, 1987. Mont. Code Ann. § 1- 2-201. (Resp. App. 3). The statute which was construed and applied by the Montana Supreme Court is set forth at Petitioner's Appendix 22a. In the words of Justice Harrison:

> *This case concerns the imposition of beneficial use taxes, pursuant to § 15-24-1203, MCA (1983),* for appellant's use of the Hot Springs to Idaho Border portion of the BPA 500 kilovolts (KV) transmission line system within the State of Montana.

Portland General Electric Co. v. Department of Revenue, 773 P.2d 1189, 1190 (1989).

The Respondents specifically proved that they had imposed beneficial use taxes, pursuant to Mont. Code Ann. § 15-24-1203 (1983), upon users of state owned property and upon users of city owned property.

> *At trial the only references to imposition of beneficial use taxes on state-exempt property dealt with two short line railroads and the Great Falls Industrial Park.* The Bureau Chief for the Intercounty Property Bureau testified that in 1986 the DOR determined these railroads qualified for imposition of beneficial use taxes under § 15-24-1203, MCA. She testified that those taxes were appealed to the State Tax Appeal Board, but that at the time of the trial, January 19, 1987, the railroads were still subject to beneficial use taxation. The Cascade County Assessor testified that the DOR had assessed beneficial use taxes on users of facilities at the Great Falls Industrial Park where the DOR found private parties' use

> met the requirements of § 15-24-1203, MCA. Neither party introduced any other beneficial use of similarly situated state exempt property, though several instances of beneficial use of other federal exempt properties were described. *Based upon the above testimony we do not find the DOR discriminated against users of federal property in favor of similarly situated users of state exempt property.*

Pacific Power & Light Co. v. Department of Revenue, 773 P.2d 1176, 1184 (1989).

It is disingenuous for PGE to assert, as it does at pages 18 and 19 of its Petition, that the Department has not taxed users of state owned and city owned property. The record and the decision of the Montana Supreme Court, belie that argument. The reliance upon *United States v. Manassas*, 830 F.2d 530 (4th Cir. 1987), affirmed, 108 S.Ct. 1568 (1988) and *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376 (1960) is entirely misplaced.

2. The Legislative History Supporting the Amendment to Mont. Code Ann. § 15-24-1203 (1983) Reflects That the Montana Legislature Sought to Close a Tax Loophole.

The legislative history reflects an effort by the Montana Legislature to prevent a tax windfall. The Legislature recognized that owners of 500 kv systems, such as the Colstrip owners, would pay ad valorem taxes. It also recognized that the investor-owned utilities, who had contracted for the use of the 500 kv system west of Townsend, would entirely escape Montana taxation. In order to close this loophole, the use tax statute was amended to include 500 kv facilities.

This Court has rejected the argument that taxes which are transferred to consumers, through ratemaking proceedings and contractual provisions, infringe the Commerce Clause.

> . . . [T]he only remaining foundation for their discrimination theory is a claim that the tax burden borne by the out-of-state consumers of Montana coal is excessive. . . . Either way, the premise of appellants' argument is invalid. Furthermore, appellants have completely misunderstood the nature of the inquiry under the fourth prong of the *Complete Auto Transit* test.

Commonwealth Edison v. Montana, 453 U.S. 609, 620-621.

The theory advanced by PGE would utterly disrupt every state tax system. Nothing is more commonplace in the utility business than the principle that taxes, accrued in one state, may be passed on to ratepayers in another state. *Appalachian Power Co. v. Federal Power Commission*, 382 F.2d 237 (4th Cir. 1964), cert. den. 379 U.S. 829 (1964). It matters not one whit that the ad valorem taxes imposed upon PGE in Montana, as a result of its operation and use of the Colstrip generating plants, will ultimately fall upon Oregon ratepayers and consumers. PGE would be completely barred from raising a Commerce Clause discrimination argument upon those facts. In a similar fashion, its theory about exportation of beneficial use taxes to its consumers in Oregon must be rejected.

3. The Beneficial Use Tax Statute is Administered by the Department of Revenue in an Even Handed Fashion Which Favors the Colstrip Owners.

PGE again makes an erroneous reference at page 20 of its Petition to Mont. Code Ann. § 15-24-1203 (1987). The taxes at issue were not imposed pursuant to that statute.

a. Montana Cooperatives or Preference Customers of BPA do not Use the 500 KV Transmission Line System.

PGE persists in its misinterpretation of the Department's Brief to the Montana Supreme Court. Its attention

is respectfully invited to a major portion of the Brief concerning beneficial use interests in the 500 kv system. It is denominated "The Preference Customers of Bonneville Power Administration Do Not Use the Montana Intertie". (DOR Brief, Pg. 31, November 10, 1988).

The Montana Supreme Court disposed of PGE's argument concerning preference customers or cooperative customers. The Montana Supreme Court specifically held, "In regard to the Owner's claims regarding the REAs, we note they do not use the Montana Intertie line, nor possess firm transmission demands in 500 KV lines which may be taxed in 1984, under § 15-24-1203, MCA." *Pacific Power & Light Co. v. Department of Revenue*, 773 P.2d 1176, 1188.

The Colstrip owners and PGE are thus reduced to contesting a fact issue. They abjectly failed to convince the Montana Supreme Court that the cooperative customers of BPA in Montana use the 500 kv system. It is respectfully submitted that this factual finding is beyond the proper ambit of certiorari. *Southern Power Co. v. North Carolina Public Service Commission*, 263 U.S. 508 (1924).

Preference customers of BPA or cooperative customers are distinct from investor-owned utilities. Investor-owned utilities have a profit-making animus. Cooperatives acquire federal power, and sell it to their customers at cost, or without profit. (Pacific – Eskridge Tr. Pg. 474), 16 U.S.C. § 832b (Resp. App. 4). Investor-owned utilities, such as PGE, transmit large blocks of privately owned power across high voltage transmission lines on a bulk power transfer basis. Montana cooperatives have no coal-fired plants. They generate no power. They transmit no power. They are not bulk power transferrers with respect to 500 kv systems. They purchase federal power at a priority firm rate. *Pacific Power & Light v. Department of Revenue*, supra. They are not directly served by the transmission lines of BPA. Each cooperative in Montana is served by a wheeling agreement, under which MPC's lines are used to transmit federal power to the cooperative. *Ottertail Power Co. v. United States*, 410 U.S. 366

(1973). According to Mr. Eskridge, the cooperatives did not request that the 500 kv transmission line in Montana be constructed for their benefit. (Pacific – Eskridge Tr. Pg. 555). The Colstrip owners, including PGE, did make such a request.

Congress has accorded specific priority and preference to cooperatives. In enacting the Pacific Northwest Electric Power Planning and Conservation Act of 1980, Congress secured the existing preference or priority rights in favor of all cooperatives. 16 U.S.C. § 839c(a) (Resp. App. 7), 16 U.S.C. § 839g(c) (Resp. App. 9). The specific preference to federal power, which is enjoyed by cooperative customers, was conferred by Congress when it enacted the Bonneville Project Act in 1937. 16 U.S.C. § 832c (Resp. App. 5). Congress specifically classified cooperatives and investor-owned utilities separately, for purposes of disposition of federal power by BPA. 16 U.S.C. § 839c(e). (Resp. App. 8). The historic difference between preference customers of Bonneville and investor-owned utilities, has long been recognized by the courts. *Central Lincoln Peoples District v. Johnson*, 735 F.2d 1101 (9th Cir. 1984).

The Montana Supreme Court correctly held that cooperative customers of BPA are not similarly situated entities, with respect to the use of 500 kv transmission lines. They do not use the 500 kv system, and it was not constructed for their benefit. There is no discrimination under the commerce clause. *New Energy Co. of Indiana v. Limbach*, supra.

b. The Department of Revenue's Assessment Methodology is not Dependent Upon Actual Power Flow.

PGE misreads the Department's assessment methodology and the Montana Supreme Court's decision.

> Reviewing the facts, we conclude that the tax was imposed on the privilege of using the property. The assessment reflects PGE's contractual reserve arrangement with the BPA, thereby

ignoring actual flows and the lines' west to east transmission capacity.

Portland General Electric Co. v. Department of Revenue, 773 P.2d 1189, 1194.

PGE is again contesting a factual issue which it lost. Such a factual determination is not a basis for a writ of certiorari. *General Talking Pictures v. Western Electric Co.*, 304 U.S. 175 (1938).

The Department's assessment methodology ensures that the measure of the tax is the reserved transmission demand in favor of PGE in its Garrison West Agreement. PGE is taxed, based upon the reasoned business judgment which it exercised in reserving transmission line capacity. As the Montana Supreme Court noted, the assessment methodology was adopted "[t]o eliminate any influence of 230 KV lines in the assessment, . . ." *Portland General Electric Co. v. Department of Revenue*, supra, at 1193.

This Court has held that a tax will not be overturned based upon differing valuation methodologies, so long as the method or rule is fair. *Western Union Telegraph Co. v. Attorney General*, 125 U.S. 530 (1888).

The taxes levied upon PGE for reserving the right to continuously transmit 65 megawatts of Colstrip power across the 500 kv system, amounted to $12,700 for 1985. This nominal amount of taxes is not discriminatory. Its argument as to a burden upon out of state consumers was rejected by this Court in *Commonwealth Edison v. Montana*, supra.

c. The Department's Assessment Methodology Mitigates the Tax Assessment in Favor of PGE.

PGE persists in another valuation argument which was soundly rejected by the Montana Court. This Court has repeatedly sustained utilization of the unit method of appraisal, in order to value interstate property. *Chicago, B. & Q. Ry. Co. v. Babcock*, 204 U.S. 585 (1907), *Louisville & Nash R.R. Co. v. Greene*, 244 U.S. 522 (1917).

The Montana Supreme Court specifically held that the beneficial use assessment had been integrated into the Department's unit method of appraisal. *Portland General Electric Co. v. Department of Revenue*, 773 P.2d 1189, 1193. The inclusion of the beneficial use cost of the Hot Springs to Idaho Border portion of the 500 kv system, was mitigated in the unit method. Its inclusion in the cost indicator was weighted by 40%. PGE's assessment was based upon 40% of the depreciated cost of the line, times the reserved transmission demands in the transmission line system. This method insured that there was no full attribution of the entire cost of the transmission line system to PGE, as a measure of its beneficial use interest. *United States v. County of Allegheny*, supra.

The hypothetical example offered by PGE, at pages 23 and 24 of its Petition, falls under its own weight. A transmission line cannot be operated to transmit 1,300 megawatts of power simultaneously in each direction. Since the power flows will in fact cancel, the example is hypothetically irrelevant, and practically impossible.

D. The Fourteenth Amendment: The Imposition of Beneficial Use Taxes Upon PGE Does Not Violate the Due Process or the Equal Protection Clause.

Challenges to a state tax, upon due process grounds, are rare indeed. *A. Magnano Co. v. Hamilton*, 292 U.S. 40 (1934). The nexus requirement compelled by *Miller Bros. v. Maryland*, 345 U.S. 340 (1954), cannot be disputed in light of the material set forth in this Brief. Without the use of the Hot Springs to Idaho Border portion of the 500 kv system, PGE would have been unable to transmit its limited 65 megawatt share of Colstrip power, prior to the completion of the 500 kv system from Garrison to Taft. (PGE – Mikolaitis Tr. Pg. 77). PGE requested that the 500 kv system be completed to Hot Springs, in order that its Colstrip power could be transmitted pursuant to the terms of its contract. BPA complied with the request. The nexus between the use of a system which was specifically designed to transmit Colstrip power, and the physical

existence of 350 miles of 500 kv system across Montana, is evident.

> The States, of course, have broad powers to impose and collect taxes. A State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable.

Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, ___ U.S. ___, 109 S.Ct. 633, 638 (1989).

Preference customers of BPA are singularly distinctive from investor owned utilities. The former are not users of the 500 kv system, while the latter are. The Montana Legislature drew a reasonable distinction by providing for the beneficial use taxation of 500 kv systems.

The misinterpretation of Mont. Code Ann. § 15-24-1203 (1983), by PGE is evident. The statute requires that possession *or beneficial use* be established as a predicate for taxation. These disjunctive and equally justifiable bases for taxation, are precisely the bases which were sustained by this Court in *United States v. County of Fresno*, supra.

CONCLUSION

The Writ of Certiorari sought by PGE should be denied.

Respectfully Submitted,

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No. 89-266

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In the Supreme Court of the United States

OCTOBER TERM, 1989

PORTLAND GENERAL ELECTRIC COMPANY, PETITIONER

v.

MONTANA DEPARTMENT OF REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the state tax assessed against petitioner, based on its contract with the Bonneville Power Administration to have electricity generated by petitioner transmitted over that agency's power lines in Montana, violates the Supremacy Clause, the Commerce Clause, or the Fourteenth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

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PORTLAND GENERAL ELECTRIC COMPANY, PETITIONER

v.

MONTANA DEPARTMENT OF REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner is an investor-owned, Oregon corporation which provides retail electric utility services to customers located in the State of Oregon. Petitioner owns an undivided 20% interest in two coal-fired generating facilities, Colstrip Units 3 and 4, located in southeastern Montana. The remaining 80% interest in Colstrip Units 3 and 4 is owned by

four other utility companies which provide retail electric utility services to customers in a number of western States, including Montana.[1] Colstrip Units 3 and 4 began operation in October of 1983 and 1985, respectively. Pet. App. 14a, 22a-23a.

With the development of Colstrip Units 3 and 4, petitioner and the other Colstrip owners needed additional transmission capacity to carry electricity generated at the Colstrip facilities to the west, where their customers are located. The Colstrip owners took various steps to provide the necessary capacity. First, they converted existing transmission lines of lower voltage to a 500 kilovolt transmission line from the Colstrip generating plant to Broadview, Montana. Pet. App. 31a. Second, they built a double circuit 500 kilovolt transmission line from Broadview, Montana to a point near Townsend, Montana. *Id.* at 32a. Third, the Colstrip owners requested that the Bonneville Power Administration (BPA)[2] construct 500

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[1] The other four owners of Colstrip 3 and 4 are Pacific Power & Light Company (which provides retail electric utility service to customers located in Montana, Idaho, California, Wyoming, Washington and Oregon), Washington Water Power Company (which provides retail electric services in Washington and Idaho), Puget Sound Power & Light Company (which provides retail electric services in western Washington), and Montana Power Company (which provides retail electric services in Montana). Pet. App. 22a, 30a.

[2] BPA markets power from the federal generation system in the Pacific Northwest, and it owns approximately 75% of the total transmission grid in the Pacific Northwest. Pet. App. 33a. Under 16 U.S.C. 832c, States, public power districts, counties, municipalities, and cooperatives are accorded preferential access to BPA power. Most of BPA's preference customers in Montana, including rural electric coopera-

kilovolt transmission lines west from Townsend, Montana to Garrison, Montana (the Montana Intertie line) and west from Garrison, Montana to Taft, Montana (the Garrison West line). *Id.* at 32a-33a, 53a. BPA agreed. The Montana Intertie line was completed in 1983; the Garrison West line, in contrast, was not completed until 1986. *Id.* at 53a. Prior to completion of the Garrison West line in 1986, the only 500 kilovolt line providing access from Garrison, Montana to the Idaho border was the BPA-owned line running from Hot Springs, Montana, to Dworshak, Idaho. *Id.* at 23a.

In connection with the construction of the Montana Intertie line and the Garrison West line, the Colstrip owners entered into long-term contracts with BPA. They acquired the contractual right to have BPA transmit Colstrip power over BPA's Montana Intertie line for a period of 22 years, with a right by the owners to renew at comparable terms. Pet. App. 37a-39a. They also entered into separate contracts for the transmission of power by BPA westward from Garrison. *Id.* at 23a.

Under petitioner's agreement, power would be transmitted from Garrison over BPA's "main grid" system to an Oregon substation. Pet. App. 23a. According to petitioner's report to the State, it had "a contract right to certain services provided by [BPA]" on the 500 kilovolt line between Hot Springs, Montana and the Idaho border. *Id.* at 16a, 25a.[3] Under

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tives (REAs), receive BPA power after that agency transmits it over federal lines to interconnections with intermediate utilities which then carry the power to the cooperatives. Pet. App. 34a.

[3] Prior to the completion of the Garrison West line in 1986, a gap existed in the 500 kilovolt lines between Garri-

the contractual terms, moreover, after scheduling of Colstrip power over BPA's Hot Springs-to-border line began, petitioner was required to make monthly payments to BPA, regardless of the amount of electricity transmitted. *Id.* at 25a.

2. Montana imposes ad valorem property taxes on property owned by corporations. This tax is fully applicable to utilities; it specifically includes "electric power or transmission lines." Mont. Code Ann. § 15-23-101(2) (1989). In addition, Montana imposes a general beneficial use tax on private users of tax-exempt property—the tax is on "the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation." Mont. Code Ann. § 15-24-1203 (1989). In 1983, the Montana legislature amended this beneficial use tax statute to include explicitly electrical transmission lines of 500 kilovolts or more. As a result, the beneficial use tax specifically provides that "[t]he tax shall be imposed upon the possession or other beneficial use of an electrical transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax." *Ibid.*

3. The Montana Department of Revenue (DOR) assessed a beneficial use tax, for 1984, against the

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son and Hot Springs. BPA's capacity to transmit Colstrip power between Garrison and Hot Springs was limited to 330 megawatts transmitted over 230 kilovolt lines. Pursuant to contracts, BPA reserved this lower transmission capacity to the five Colstrip owners, pending completion of the 500 kilovolt Garrison West line; the Colstrip owners allocated this capacity among themselves. and petitioner obtained the right to transmit 65 megawatts. Pet. App. 14a-16a, 23a-24a.

Colstrip owners. The basis for the assessment was the DOR's determination that the Colstrip owners had a beneficial use of BPA's Intertie line. Pet. App. 30a, 41a, 52a-54a. Similarly, for 1985, the DOR assessed an additional beneficial use tax against petitioner. The basis for that assessment was the DOR's determination that petitioner had a beneficial use of BPA's line from Hot Springs, Montana to the Idaho border. *Id.* at 14a, 16a, 25a.

The Colstrip owners brought suit in Montana state court challenging the tax assessment for use of the Intertie line on the ground that the tax violated the Supremacy Clause, both because it contravened principles of intergovernmental immunity and because it violated 15 U.S.C. 391, which prohibits state discrimination against electricity transmitted and generated in interstate commerce. They also raised objections based on the Commerce Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as state law. In addition to being a plaintiff in that suit, petitioner also filed suit in Montana state court challenging the imposition of the beneficial use tax for use of the line from Hot Springs to the Idaho border. Pet. App. 21a-22a, 44a.

On December 21, 1987, the Montana state trial court rejected the Colstrip owners' claim regarding the imposition of the beneficial use tax for use of the Intertie line. Pet. App. 29a-50a. On January 19, 1988, the court similarly rejected petitioner's challenge to the use tax for use of the Hot Springs line, and relied on its decision in the prior case. *Id.* at 13a-20a.

On April 17, 1989, the Montana Supreme Court affirmed the trial court's decision regarding the tax on the Colstrip owners for use of the Intertie line.

Pet. App. 51a-70a (the Intertie decision). On May 10, 1989, moreover, the Montana Supreme Court affirmed the trial court's decision regarding the tax on petitioner for use of the Hot Springs line. *Id.* at 21a-28a (the Hot Springs decision). The court relied, in large part, on its analysis in the prior Intertie decision. *Id.* at 25a.

In this petition, petitioner seeks review of the Hot Springs decision. In a separate pending petition (*Pacific Power & Light Co.* v. *Montana Dep't of Revenue*, No. 89-364), petitioner and the other Colstrip owners seek review of the Intertie decision.

DISCUSSION

Petitioner contends that the assessment of taxes by the DOR for its alleged beneficial use in 1985 of BPA's 500 kilovolt line between Hot Springs, Montana and the Idaho border violates the Supremacy Clause, the Commerce Clause, and the Fourteenth Amendment. Because the Montana Supreme Court's decision rests on highly specific factual grounds and does not appear to present an issue of recurring significance, we do not believe that review by this Court is warranted.

1. Petitioner's claim under the Supremacy Clause is two-fold. Petitioner contends (Pet. 6-10) that the tax violates principles of intergovernmental immunity because petitioner did not operate, control or service the line, and petitioner's contract with BPA therefore did not confer on petitioner a beneficial use interest in BPA's line so as to permit taxation of such an interest. In addition, petitioner contends (Pet. 10-11) that the Montana tax violates 15 U.S.C. 391 by taxing only the beneficial use of high capacity 500 kilovolt electric lines, which are used to transmit electricity over long distances.

a. Under settled principles of intergovernmental immunity, it is well established that, in the absence of congressional consent, a State cannot impose a tax directly on the United States (*United States* v. *New Mexico*, 455 U.S. 720, 733 (1982)); cannot impose a tax the legal incidence of which falls on the United States (*United States* v. *County of Fresno*, 429 U.S. 452, 459 (1977)); and cannot impose a tax that operates to discriminate against the United States or those with whom it deals (*Washington* v. *United States*, 460 U.S. 536, 540 (1983)). It is equally well established, however, that "a State may, in effect, raise revenues on the basis of property owned by the United States as long as that property is being used by a private citizen or corporation and so long as it is the possession or use by the private citizen that is being taxed." *United States* v. *County of Fresno*, 429 U.S. at 462. Such a tax must be nondiscriminatory (*id.* at 464; *United States* v. *City of Detroit*, 355 U.S. 466, 473 (1958)), and it must not exceed the private party's interest in the federally owned property (*United States* v. *County of Fresno*, 429 U.S. at 462-463 n.10; *United States* v. *Allegheny County*, 322 U.S. 174, 186-187 (1944)).

The Montana Supreme Court cited these general principles. Expressly relying on *County of Fresno*, it stated, in the Intertie decision, that a "state's right to impose beneficial use taxes on a private citizen or corporation's possession or use of property owned by the United States is well established" but that such a tax "must be imposed equally on others similarly situated." Pet. App. 54a. Similarly, in the Hot Springs decision that is the subject of this petition, the Montana court explicitly adopted by reference its reasoning in the Intertie decision (*id.* at 25a) and

again stated that a "tax for the beneficial use of property, as distinguished from a tax on property itself, is commonplace." *Id.* at 27a.[4]

In its decisions, the Montana court rejected the utilities' contention that a finding of possession, exclusive use, or control is necessary to support a beneficial use tax on the purported user of federal property (Pet. App. 26a, 55a), and undertook an extensive factual analysis to determine whether there is a sufficient use of federal property to justify imposition of the state tax. In the Intertie decision, the court determined that the Colstrip owners have "an enforceable contract interest which gives them the right to the beneficial use of firm * * * megawatts of power transmitted over the Montana Intertie line" (*id.* at 56a); that the Colstrip owners have "the right to inject electrical power into and remove electrical power from the lines up to specific maximum megawatts of power" (*ibid.*); that the Colstrip owners' right is "subject only to the BPA's ability to transmit these amounts onward" (*ibid.*); that the "project scheduled power * * * remained under the ownership of the [utilities]" (*ibid.*); that the Colstrip owners have "exercised this right and used these lines to transmit power for their own commercial profit-making activities" (*ibid.*); and that the Colstrip owners are primarily responsible for the

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[4] In both decisions, the court addressed the meaning of "beneficial use" in the context of interpreting the reach of the state statute (Pet. App. 26a, 58a); in both decisions, however, the court relied primarily on federal principles and authority regarding intergovernmental immunity in determining whether the tax on the "beneficial use" was permissible. *Id.* at 26a-28a, 54a-57a. See also *id.* at 44a-45a (in Intertie case, trial court addresses Colstrip owners' beneficial use argument as Supremacy Clause challenge).

total annual cost of the lines (*ibid.*). Similarly, in the Hot Springs decision, the Court found that petitioner "contracted for firm transmission capacity over the BPA lines" (*id.* at 26a); that it thereby received "an enforceable contract interest in firm megawatts of power" (*ibid.*); that "the power flowing through the lines remain[s] under [petitioner's] ownership" (*ibid.*); that petitioner "pays for the use of the lines regardless of the actual transmission flow" (*ibid.*); and that "the reservation of firm transmission demand grants [petitioner] an exclusive right" (*ibid.*). The Montana court's decisions thus rely on highly specific factual determinations.

Petitioner's principal intergovernmental immunity claim (Pet. 6-10) is limited in its scope. Petitioner's principal claim is not that the legal incidence of the tax falls on the federal government; nor is it that the tax impermissibly discriminates against those who deal with the federal government.[5] Petitioner's principal intergovernmental immunity claim, rather, is that "beneficial-use taxes may not be imposed on account of federal property unless the taxpayer possesses and controls the facilities subject to the tax" (Pet. 6) and that the Montana Supreme Court's rejection of this claim was erroneous (*ibid.*).

In light of the highly specific factual circumstances relied on by the Montana Supreme Court, however, petitioner does not present substantial reasons for this Court to address that argument and to review the Montana court's conclusion that a sufficient use of federal power lines existed to warrant state taxation of private use of those lines. Petitioner suggests

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[5] In a footnote, petitioner summarily notes that the legal incidence and discriminatory application are "addressed" in the context of its other claims. Pet. 9 n.10.

that the Montana court's opinion will have wide-ranging consequences. Pet. 6-7. This prediction is belied, however, by the narrow, case-specific circumstances on which the Montana court relied. Accordingly, further review of this issue by this Court is not necessary at this time and in this case.[6]

b. Petitioner also contends (Pet. 10-11) that Montana's beneficial use tax violates 15 U.S.C. 391 because it taxes only beneficial use of lines with a capacity of at least 500 kilovolts, and does not tax beneficial use of lines with lower voltage. The statute provides that "[n]o State * * * may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity"

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[6] Amici Pacific Gas and Electric et al. contend that the Montana court's decisions will have broad applicability, particularly regarding taxation of utilities who contract with the federal government. Amici Br. 1-6. To the extent that the Montana court's decisions may be given more far-reaching consequences than are apparent from the court's opinions and the petition, those developments can and should be addressed, on their merits, in subsequent litigation. The federal government, moreover, has not been a party to the litigation in the Montana courts; as a result, the federal government has not contributed to the development of the record as a party, and did not present its views of the intergovernmental immunity issue to the lower courts. By contrast, the two recent federal decisions relied on by petitioner (Pet. 9-10) were cases in which the federal government contributed to the development of the record as a party and presented its views of the intergovernmental immunity issue to the lower courts. See *United States* v. *Hawkins County*, 859 F.2d 20 (6th Cir. 1988), cert. denied, 109 S. Ct. 1638 (1989); *United States* v. *Jackson County, Missouri*, 696 F. Supp. 479 (W.D. Mo. 1988).

(15 U.S.C. 391); the statute defines a tax as "discriminatory" if "it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce" (*ibid.*). In *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141 (1979), this Court held that a New Mexico tax provision, which in effect gave a tax benefit only to electricity sold in New Mexico, violated Section 391. Petitioner maintains that Montana's use tax is similarly discriminatory because the restriction to lines of at least 500 kilovolts results in a greater tax burden on electricity that is generated and transmitted in interstate commerce.

Selective taxation of high voltage lines clearly has the potential to discriminate against electricity in interstate commerce. Again, however, the specific factual findings relied on by the Montana court suggest that the issue does not merit review in this case. In the Intertie decision, the court noted that one of the five utilities—Montana Power Company—is an "intrastate user" and that Montana Power "is taxed at the same rate as the other users of the facilities." Pet. App. 64a.[7] The court specifically distinguished *Arizona Public Service* because electricity sold to Montana consumers is treated no differently from

[7] The Montana Power Company (MPC), one of the Colstrip owners, is "a Montana corporation which provides retail electric service to customers located in Montana." Pet. App. 30a. Another of the Colstrip owners—Pacific Power & Light—also has customers in Montana (as well as five other States). *Ibid.* In the Commerce Clause part of its analysis in the Intertie decision, the Montana court noted that "MPC and Pacific used the power to service Montana customers and were assessed and taxed in the same manner as the other users of the lines." *Id.* at 59a.

electricity sold to consumers in other States (Pet. App. 63a-64a). We are mindful that inclusion of an intrastate entity, or some intrastate consumers, does not necessarily validate a discriminatory tax. Nevertheless, the findings we have described counsel against the need for this Court's review in this case.[8]

2. Petitioner also contends (Pet. 12-24) that the beneficial use tax violates the Commerce Clause. Under settled Commerce Clause principles, a state tax is valid if it is applied to an activity that has a substantial nexus with the taxing State; if it is fairly apportioned; if it does not discriminate against interstate commerce; and if it is fairly related to the services provided by the State. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). In the Intertie decision, the Montana Supreme Court addressed each of these factors. Pet. App. 58a-62a. In the Hot Springs decision, as on other issues, the court explicitly adopted by reference its analysis in the Intertie decision. *Id.* at 25a.

Petitioner's principal contention is that the tax discriminates against interstate commerce.[9] For the

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[8] As an additional Supremacy Clause ground, petitioner asserts in a footnote (Pet. 11 n.13) that by authorizing "impact aid" payments to local governments with respect to major federally owned transmission facilities (16 U.S.C. 839(m)), Congress "appears to have intended" that the impact aid payments would be the sole source of revenue available to local taxing districts from federal transmission facilities. Petitioner fails to cite any evidence, however, in either the language of the statute or its legislative history, to support its suggestion that Congress intended the impact aid payments to pre-empt the imposition of otherwise permissible beneficial use taxes.

[9] Although petitioner suggests that the taxed activity lacks the requisite nexus to the taxing State (Pet. 12-13), the

same reasons that the Section 391 argument regarding discrimination does not require review, however, the argument under the Commerce Clause likewise does not warrant review. Indeed, Section 391 has been interpreted to impose a more stringent anti-discrimination requirement than the Commerce Clause. See *Arizona Public Service Co.* v. *Snead*, 441 U.S. at 152 (Rehnquist, J., concurring in the judgment). The Montana court applied the established Commerce Clause framework to the facts of the case; relying on *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981), it found that impermissible discrimination had not been established because interstate and intrastate consumers are treated the same. Pet. App. 59a. The court's fact-specific determinations do not call for further review.[10]

Montana court correctly determined, in the Intertie decision, that the contracts to transmit the Colstrip owners' power from their in-state generating plants over lines within the State constitute sufficient nexus (Pet. App. 58a-59a), and the same analysis applies to the Hot Springs contract. Although petitioner also suggests that the basis for the tax "calls into question" the fair apportionment and fair relationship prongs, petitioner addresses those issues only "in the context" of its other arguments. Pet. 13.

[10] In addition to arguing that the limitation to lines of 500 kilovolts or more is discriminatory, petitioner claims that three other provisions reveal the State's discrimination. In fact, none of the three supports petitioner's claim. Petitioner first objects (Pet. 15-16) that rural electric cooperatives are taxed at 3% while investor-owned property is taxed at 12%; this general objection to tax rates applicable to non-exempt property is a fundamentally different claim from the challenge to the imposition of the beneficial use tax at issue here. Petitioner also objects (Pet. 17-18) to the differential treatment of rural electric cooperatives in a state statute authorizing a tax on federal property if Congress gives permission

3. Finally, petitioner challenges (Pet. 24-25) the Montana tax under the Fourteenth Amendment. Petitioner maintains that the tax violates due process and equal protection.

Petitioner's due process objection is that there is an insufficient nexus between it and the Hot Springs-Idaho border line to justify imposition of the tax. Pet. 24. In the Intertie decision, however, the Montana court responded to the due process argument by pointing out that, under its *Complete Auto Transit* Commerce Clause analysis in the Intertie opinion, the court had found a sufficient nexus between the object of the tax and the State to justify the tax, and a fair relationship between the tax and the services provided by the State. Pet. App. 66a-67a. In that analysis, the Montana court had found that nexus was satisfied because the utilities had contracted for the use of BPA lines in Montana to transmit power through Montana (*id.* at 58a-59a), and that fair relationship was satisfied because the tax was imposed on the basis of the activities within the State (*id.* at 62a). Petitioner fails to offer a substantial reason for reviewing these findings (either with respect to both decisions or solely with respect to the Hot Springs decision), or for finding a due process violation if these determinations stand.

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to do so; since Congress has not given such permission, however, the state provision is not operative and its mere existence is weak support for petitioner's claim, even if it is otherwise relevant. Finally, petitioner objects (Pet. 18-19) to a 1987 amendment to the beneficial use statute; since that amendment post-dates the assessment at issue here, it is not relevant to the claim at issue. Petitioner's objections to the valuation methodology actually employed by the State (Pet. 22-24), moreover, present factbound issues that do not merit this Court's review.

Petitioner's equal protection challenge (Pet. 25) is based on the claim that the beneficial use tax is being administered in an unequal fashion. Petitioner contends that the tax is not being imposed on rural electric cooperatives and that it had not been imposed in the past unless a taxpayer had physical possession and exclusive use of otherwise exempt facilities. *Ibid.* In the Intertie decision, the Montana court rejected petitioner's equal protection challenge, noting that the possession of "firm transmission demands in 500 KV lines" reasonably distinguished petitioner from the rural electric cooperatives (Pet. App. 67a); the claim regarding possession and use, moreover, is essentially a recasting of the beneficial use intergovernmental immunity claim, and the Montana court's findings regarding a sufficient use are applicable. As with petitioner's challenges under the Supremacy Clause and the Commerce Clause, the Montana court's Fourteenth Amendment analysis rests on the particular factual findings in this case, and does not require this Court's review.[11]

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[11] The legal claims by petitioner and the other Colstrip owners in the petition challenging the Intertie decision (*Pacific Power & Light* v. *Montana Dep't of Revenue*, No. 89-364) are similar to the claims in this petition. In that petition, the Colstrip owners explicitly state that the legal incidence of the tax falls on the federal government. Cf. note 5, *supra*. However, they merely assert, without explanation, that the "incidence" of the beneficial use taxes "is in part on BPA because of the 'exchange' provision of the Regional Act" (89-364 Pet. 16). Evidently, the Colstrip owners are referring to 16 U.S.C. 839c(c), under which the BPA must purchase electricity generated by privately owned utility companies at the average system cost of the utility's resources, and offer, in exchange, to sell an equivalent amount of electric power to the utility for resale to residential users

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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within the region. Under the decisions of this Court, however, it is clear that, even if the BPA may pay a higher cost to the utility as a result of the utility's having paid beneficial use taxes, that fact does not necessarily shift the incidence of the tax from the utility to the BPA. See, *e.g.*, *United States* v. *New Mexico*, 455 U.S. 720, 734 (1982).

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In The

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October Term 1989

PORTLAND GENERAL ELECTRIC COMPANY,

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v.

MONTANA DEPARTMENT OF REVENUE, et al.,

Respondents.

MOUNTAIN STATES LEGAL FOUNDATION'S MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* IN SUPPORT OF WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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MOUNTAIN STATES LEGAL FOUNDATION'S MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

Pursuant to Rule 36 (.1) of the Supreme Court Rules, Mountain States Legal Foundation (MSLF) respectfully requests that this Court grant it leave to file the attached brief *amicus curiae* in support of the Petition For Writ of Certiorari to the Montana Supreme Court filed by the Petitioner, Portland General Electric Company. Consent for the filing of this brief has been obtained from counsel for the petitioner, Portland General Electric Company, however, permission from counsel for the Montana Department of Revenue, was requested by telephone and denied.

In support of this motion, MSLF states as follows:

1. MSLF is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberty, the right to own and use property, and the free enterprise system. MSLF takes great interest in questions of law having national scope and especially those that have a direct impact in the Rocky Mountain region, including the State of Oregon where the incidence of the challenged tax will rest.

2. Many MSLF members are consumers of the electricity which is transmitted by the Bonneville Power Administration over its federal electric transmission grid called the Federal Columbia River Transmission System (FCRTS), created by an Act of Congress.[1] Petitioner herein, Portland General Electric Company (PGE), is one of five investor-owned utilities that owns generating facilities in Southeastern Montana, at Colstrip. PGE has entered into a "wheeling" agreement with BPA. PGE's customers all reside in the State of Oregon and have no representatives in the halls of the Montana Legislature, nor can they participate in the elections for Montana's District Court Judges and Supreme Court Justices. In *American Oil Co. v. Neill*, 380 U.S. 451, 455 (1965), this Court held:

> When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather

---

[1] 16 U.S.C. § 838b.

> than form. (citing cases) This approach requires us to determine the ultimate effect of the law as applied and enforced by a State or, in other words, to find the operating incidence of the tax.

The tax now under scrutiny will ultimately be borne by the customers of PGE, all of whom reside in the State of Oregon. Because those customers have no representation in the Montana Legislature, this amounts to "taxation without representation".

3. The State of Montana has imposed a beneficial-use tax on PGE for transmission lines constructed, owned, operated and used exclusively by a federal authority, BPA, to provide service pursuant to Congressional Authority. The incidence of the tax falls on residents of another state, Oregon, and has far reaching ramifications for the residents of every state who face the possibility that one state will tax federal property used in interstate commerce which has the effect of passing the tax to residents of those other states. MSLF seeks to present to this Court fundamental policy considerations regarding the adverse impact the Montana Statute and the decision of the Montana Supreme Court have on the residents of the State of Oregon.

4. The residents of Oregon who will suffer the adverse impact of the illegal imposition of the tax have not had an opportunity to be heard in the previous proceedings and this Court is the only tribunal which will have an opportunity to review this matter on behalf of the residents of Oregon.

5. There is a Substantive Due Process problem with the tax as applied by the Department of Revenue for the

State of Montana and allowed by the Montana Supreme Court. The taxation of federally constructed, owned, operated and used facilities, such as in the instant case, is directly contrary to the holding of this Court in *M'Culloch v. The State of Maryland, et al.*, 17 U.S. (4 Wheat.) 316 (1819). In *M'Culloch v. The State of Maryland, et al.*, this court held:

> If the states may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights. . . . (*Id.* at 432)

The "wheeling" contract between PGE and BPA requires BPA to provide electrical power to PGE over the BPA's facilities. The BPA uses the facilities to fulfill its contract with PGE. PGE's contract for BPA's services cannot give rise to a "beneficial use" tax anymore than an agreement by a citizen of Oregon for the services of the U.S. Postal service to send a package to a resident in Montana can give rise to a beneficial-use tax. The party using the mail service contracts with the U.S. Postal Service to deliver the package and the Postal service uses its own facilities and methods to fulfill the contract. There can be no tax on the agreement for Postal services by the postal patron and in the same sense there can be no tax on PGE's contract for BPA's services.

6. These considerations, while directly applicable to the instant case, transcend the specific interests of the existing parties, and thus may not be adequately addressed by these parties.

For the foregoing reasons, MSLF respectfully requests that its motion for leave to file the attached brief *amicus curiae* be granted.

DATED this 8th day of September, 1989

Respectfully submitted,

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No. 89-266

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v.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

BRIEF *AMICUS CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

The Mountain States Legal Foundation (MSLF) respectfully submits this brief *amicus curiae* in support of Portland General Electric Company, the Petitioner for certiorari.

INTEREST OF AMICUS CURIAE

The Mountain States Legal Foundation is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, private property rights, and the free enterprise system. MSLF

takes great interest in questions of law having national scope and especially those that have a direct impact in the Rocky Mountain region, including the State of Oregon where the incidence of the challenged tax will rest.

Many of the MSLF members are consumers of electricity transmitted by the Bonneville Power Administration (BPA) over its federal electric transmission grid called the Federal Columbia River Transmission System (FCRTS), which system was created by an Act of Congress.[1] The grid of transmission lines is owned, operated, used, and constructed exclusively by BPA, a federal authority. Portland General Electric Company (PGE) has a "wheeling" contract with BPA for the transmission of firm power to PGE's facility in Oregon. As a result of this contract, the State of Montana has imposed a tax on PGE for the property used by BPA to provide contractual services to PGE. All of the customers of PGE are located in the State of Oregon and have no "political check against the abuse of the power to tax" by the Montana Legislature. *United States v. County of Fresno*, 429 U.S. 452, 458. PGE is taking the position that the taxes are unconstitutional since the citizens of the State of Oregon have not been represented in the political decision to levy a tax upon them. MSLF seeks to enter this action on behalf of the citizens of Oregon and requests that this Honorable Court review the tax and the decision by the Montana Supreme Court.

MSLF is further interested in this matter because the State of Montana is attempting to tax facilities which were constructed by a federal authority and are now

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[1] 16 U.S.C. § 838b.

owned, operated and used exclusively by that same federal authority. This Honorable Court has held that a state may not tax federal facilities which are owned, operated and used exclusively by the federal government. *See M'Culloch v. The State of Maryland, et al.*, 17 U.S. (4 Wheat.) 316 (1819). By passing this particular statute, the State of Montana seeks to tax federal facilities contrary to the public policy sought to be achieved by the creation of FCRTS and BPA. The tax has been upheld by the Montana Supreme Court despite the fact that it is in direct derogation of the *M'Culloch* decision.

STATEMENT OF THE CASE

Amicus Curiae adopts Petitioner's statement of the case.

REASONS FOR GRANTING THE WRIT

I. OREGON RESIDENTS, UPON WHOM THE TAX RESTS, HAVE NO EFFECTIVE REPRESENTATION EXCEPT BEFORE THIS HONORABLE COURT

This country was founded on the principle that those who are governed must have a say in those who govern and the decisions they make. In other words, there must be representation in all aspects of government, particularly those decisions involving taxes since the power to tax is the power to destroy. The Declaration of Independence states:

> . . . governments are instituted among men, deriving their *just powers* from the *consent* of the governed. . . . (Emphasis supplied)

In setting forth the facts giving rise to the Declaration of Independence, the drafters stated:

> He has refused to pass others laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature – a right inestimable to them and formidable to tyrants only. . . .

The drafters were particularly upset with the King "for imposing taxes on us without our consent. . . ."

The framers of the Declaration of Independence recognized the critical importance of representation by those governed. They were particularly concerned about the imposition of taxes without proper representation. The principles espoused in the Declaration of Independence are protected by the United States Constitution. The Constitution provides for equal protection under the laws, including representation.

In the case at bar, the State of Montana seeks to impose beneficial use taxes on the residents of Oregon by imposing said tax on the Petitioner, Portland General Electric Company (PGE), because of the alleged "use" by PGE of transmission facilities constructed, owned, operated and used exclusively by a federal authority, Bonneville Power Administration (BPA).

Although the tax is ostensibly imposed upon PGE, the tax ultimately falls on the consumers who are all residents of the State of Oregon. This Honorable Court in *American Oil Co. v. Neill*, 380 U.S. 451, 455, held:

> When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form. (Citing cases) This approach requires us to determine the ultimate effect of the law as applied and enforced by a state or, in other words, to find the operating incidence of the tax.

Because those Oregon consumers have no representation in the Montana Legislature nor do they have the right to participate in the elections for Montana's District Court Judges and Supreme Court Justices, this amounts to "taxation without representation."

The issue of legislation without representation has arisen in the context of the Indian tribes and tribal government. Most recently this Honorable Court discussed that issue in *Wilkinson v. Confederated Tribes and Bands of Yakima Indian Nation, et al.*, ___ U.S. ___, 87-1697, 57 U.S.L.W. 4999. Justice Stevens, in discussing the authority of the Indian Tribe to determine the character of land owned predominantly by non-Indians, stated:

> Moreover, it is unlikely that Congress intended to give the tribe the power to determine the character of an area that is predominantly owned and populated by nonmembers, who represent eighty percent of the population yet *lack a voice* in tribal governance. (Emphasis supplied)

The framers of the Constitution and Declaration of Independence recognized the importance of protecting the "voice" of the governed in legislation. To paraphrase Justice Stevens, it is unlikely that the framers of the Constitution intended that Montana have the right to tax

Oregon residents when they "lack a voice in [Montana] governance."

The decision of the Montana Supreme Court and the tax in question are particularly onerous because there is no "political check against abuse of the power to tax" because the persons upon whom this tax falls have no right or voice in the governmental process. *United States v. County of Fresno*, 429 U.S. 452, 458-459 (1977).

In *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444, this Honorable Court held:

> That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.

All of the facilities owned, operated and used by PGE in the State of Montana are taxed as are the facilities of any other private individual or corporation. But in this particular case, the State of Montana attempts to impose a tax on transmission facilities that are owned, operated and exclusively used by the federal government, namely the BPA. Those facilities are not owned or used by PGE. There is no protection, opportunity or benefit given to PGE by the State of Montana for which the tax can be exacted. In other words, there is no nexus or relationship between the tax imposed by the State of Montana and any opportunity, benefit or protection provided to PGE by the State of Montana. Because there is no connection between the protection provided, the State of Montana is in

essence taking the property of PGE without due process of law, which violates the Fourteenth Amendment.

The same argument would apply to the residents of the State of Oregon who are the consumers of the electricity. The State of Montana provides no protection, benefit or opportunity to the residents of the State of Oregon. The "protection, benefit and opportunity," if any, is provided only to BPA. As BPA is a federal facility, "protection, benefit or opportunity" is being provided by federal agencies. Because federal agencies provide the necessary "protection, benefit, or opportunity" to BPA, BPA creates no burden for the State of Montana which would give rise to the tax on BPA facilities. The State of Montana is attempting to take property of the residents of the State of Oregon without due process of law, which violates the Fourteenth Amendment of the United States Constitution.

Because there is "no political check to the abuse of the taxing power" (*County of Fresno*, 429 U.S. at 458) for residents of Oregon and there is no "protection, opportunities and benefits . . . for which [Montana] can ask return," the tax is unconstitutional. (*Wisconsin v. J.C. Penney Co.*, 311 U.S. at 444)

II. THE STATE OF MONTANA HAS NO AUTHORITY TO TAX FEDERAL FACILITIES LOCATED IN THE STATE OF MONTANA

The Montana Supreme Court in its decision affirming the lower court cited *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 127 (1906), wherein this Honorable Court stated:

> The expression "be[illegible]icial use" or "beneficial ownership or interes[illegible] property is quite frequent in the law, and means, in this connection such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner or of someone on his behalf.

It cannot be argued that PGE is enjoying or using BPA's property. BPA has *exclusive* enjoyment and use of its property. This Honorable Court in *United States v. County of Fresno*, 429 U.S. 452, 462, stated:

> These cases make clear that a state may, in effect, raise revenues on the basis of property owned by the United States as long as that property is being *used* by a private citizen or corporation and so long as it is the *possession or use by the private citizen that is being taxed.* (Emphasis supplied)

PGE *does not have* possession of or use of the BPA's facilities located in the State of Montana. Montana is trying to tax PGE for property it does not use. PGE has a contract with BPA which requires BPA – in accordance with the public policy enacted in federal statute – to use its facilities to provide power to PGE in Oregon. The power itself can come from any of a number of sources which are connected to the FCRTS. Therefore, the power may be from Washington, Oregon or any other source which is connected to FCRTS.

PGE's contract right referred to by the Montana Supreme Court to justify the imposition of the tax on PGE for BPA's property is no different than the contract right

every private citizen has in the facilities (trucks, buildings, etc.) of the U.S. Postal Service. An individual placing a letter or package in the U.S. mail makes a contract with the Postal Service that the letter will be delivered as addressed. The contract between the private individual and the U.S. Postal Service gives rise to court "enforceable" rights in the individual. If the reasoning of the Montana Supreme Court is extended to the point that the "*use*" made by a private individual of the U.S. Postal Service facilities gives rise to a "beneficial use" tax then all property of the U.S. Postal Service used to deliver the mail to each individual is subject to a comparable tax. This result is directly contrary to the decision of this Court in *M'Culloch v. The State of Maryland, et al.* In *M'Culloch,* this Honorable Court specifically held that postal facilities would not be subject to a tax even though the Postal Service uses its facilities to serve the "enforceable contract rights" of the individual.

CONCLUSION

The incidence of the tax imposed by the State of Montana falls upon the residents of the State of Oregon. Because they have no "voice" in the Montana Legislature, there is no "political check against the abuse of the power to tax" which the Constitution would guarantee under the Fourteenth Amendment. Without the constitutionally protected political check – votes – the only constitutional protection provided to the citizens of Oregon is review by this Honorable Court. The actions of the State of Montana are nothing more than "taxation with representation."

The State of Montana seeks to impose a tax on federal facilities which are neither possessed nor used by the Petitioner and the State of Montana does not provide the necessary protection, opportunity, or benefit to meet the test of whether the property is taken without due process of law. Accordingly, this Honorable Court should grant the Writ of Certiorari and reverse the ruling below.

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APPLICATION TO FILE BRIEF AMICI CURIAE AND BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 89-266

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

PORTLAND GENERAL ELECTRIC COMPANY,
Petitioner,

VS.

MONTANA DEPARTMENT OF REVENUE, et al.,
Respondents.

APPLICATION TO FILE BRIEF AMICI CURIAE AND BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

APPLICATION FOR LEAVE TO FILE BRIEF AMICI CURIAE, INTERESTS OF AMICI CURIAE AND REASONS FOR APPEARANCE

Amici Curiae Pacific Gas and Electric Company, Southern California Edison Company, the Department of Water and Power of the City of Los Angeles, San Diego Gas and Electric Company, the Sacramento Municipal Utility District, the Northern California Power Agency, the Transmission Agency of Northern California, M-S-R Public Power Agency and the Southern California Public Power Authority are publicly and privately owned utilities and joint action agencies which together generate, transmit, purchase and distribute more than 90 percent of the electrical power used in the State of California. They are responsible for delivery of electrical power to more than 26 million people. Amicus Curiae Edison Electric Institute is an association of the nation's investor-owned electric utility companies. Its members

serve 95 percent of all customers whose electric power needs are met by the investor-owned segment of the electric utility industry. They generate approximately 77 percent of all the electricity used in the country, and serve 73 percent of all ultimate consumers of electricity in the nation.

Because of the magnitude of the electric power requirements amici are required to meet and because much of that power is supplied from outside the State of California, amici have a unique perspective on the effect of taxes like the challenged Montana tax on the interstate power transmission system. For this reason, amici believe the Court would be assisted by a brief focusing on the impact of "beneficial use" taxes, like the Montana tax, on the many and varied cooperative arrangements that form the backbone of the interstate power transmission system in the Western United States.

As Appendix A attached to this brief shows, Petitioner Portland General Electric Company has consented to the filing of such a brief. As Appendix B shows, the consent of the Montana Department of Revenue could not be obtained.

Amici are vitally interested in the validity of Montana's attempt to tax Portland General Electric Company in Case No. 89-266 and the other Colstrip plant owners in Case No. 89-364 [*Pacific Power & Light Co. v. Montana Department of Revenue*] on the basis of their purported "beneficial use" of federally owned power lines which transmit power interstate.[1] If Montana can impose this tax on the Colstrip owners, then any state can impose a similar tax on any one of amici any time they transmit or receive power utilizing federally owned and operated transmission facilities whether or not amici have other contacts with the taxing state. Since federally operated transmission facilities account for approximately 80 percent of the transmission lines located in the Pacific Northwest, the prospect of such taxes poses serious concerns to amici.

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[1] Amici respectfully request that their brief in this case be considered with regard to the arguments presented in the petition in Case No. 89-364 as well.

Amici's fears are not without foundation. As the petition before this Court shows, the State of Oregon is contemplating the imposition of a similar tax on the interstate transmission of power over federally owned lines if this Court does not act to strike down Montana's tax. Amici would be directly affected by the imposition of the Oregon tax since their power purchase and exchange contracts with federal, public and private power providers extend into Oregon and involve the transmission of power over federal lines interstate into California. Moreover, there is no reason to suspect that the imposition of these "beneficial use" taxes would end with the State of Oregon. New Mexico and several other states unlawfully attempted to discriminatorily tax the generation of power transmitted interstate until this Court acted to stop that abuse. *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979).

As shown in the accompanying brief, unlimited and unrestrained discriminatory taxation on the transmission of power on federally owned interstate lines will have severe adverse economic and practical effects on amici and on the millions of customers they serve. The possibility of multiple taxation by each of these states puts at risk years and hundreds of millions of dollars of resource planning and acquisition intended to minimize or avoid the use of existing thermal electric generating stations (which are primarily fossil-fuel plants) and the construction of new plants. Either continued use or construction of such plants would have long-term adverse environmental effects.

Amici have reviewed the briefs on appeal before the Montana Supreme Court, the opinion of the Supreme Court of the State of Montana, and the Petition for Certiorari in this case. In view of the importance of the issues presented to the future transmission, distribution and sale of electric power by each of these amici, they believe that a further brief addressing the burdens created by taxes such as Montana's in the context of the current system for transmitting power interstate would be both helpful and appropriate.

DATED: September 8, 1989.

Respectfully submitted,

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BRIEF OF AMICI CURIAE

I

MONTANA'S BENEFICIAL USE TAX POSES A SERIOUS THREAT TO THE INTERSTATE TRANSMISSION OF ELECTRICAL POWER IN THE WESTERN UNITED STATES

Montana has enacted a tax which it has gone to great pains to describe as nothing more than "a beneficial use real property tax" to be levied, not on the interstate transmission of electric power, but only on "the contractual right" to use federally exempt property. Montana then contends that this case simply presents a challenge to a garden-variety "possessory interest tax" of the type approved by this Court in *United States v. County Of Fresno*, 429 U.S. 452 (1977). To understand the fallacy of that description and the mischief the tax will engender, it is first necessary to understand the system of electric power transmission in place across much of the United States, particularly in the central part of the West Coast, the Pacific Northwest and the inland Southwest.

Power is transmitted in these regions by means of numerous cooperative arrangements involving federal power marketing agencies and publicly and privately owned utilities.[1] Many of these utilities and agencies own transmission lines, and collectively they form an interconnected, integrated network over which power flows.[2] This network is used predominately for three types

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[1] The relevant federal agencies are in the Pacific Northwest, the Bonneville Power Administration (BPA), and in the west and southwest, the Western Area Power Administration. These agencies sell the power generated at the large number of federally owned dams in their regions to both publicly and privately owned utilities. They also own and operate extensive transmission facilities used to deliver the power they sell and to provide transmission service.

[2] Electricity will flow over all paths available to it, in different amounts depending on the characteristics of each line. In general, more electric power will flow over lines at higher voltages with less power lost to resistance. This is why very high voltage lines are used for long

of electrical transactions which are typically interstate: seasonal exchanges, economy energy and baseload power. A large trade in all three types occurs to secure economic and often environmental benefits. Seasonal exchanges are made to defer the need for new generating plants, which have large capital costs and often create environmental and safety concerns as well. These exchanges rely on the fact that different regions have their peak electrical power needs at different times of the year. For example, California experiences its peak demand in the summer, while the Pacific Northwest has its peak in the winter. Instead of each region building generating plants to handle peak needs, utilities use their spare capacity in their "off season" to supply energy to those in the other region, receiving energy back during their peak demand period. *See,* Meek, *Pacific Northwest Conservation For California: The Mutual Benefits Of Long-Term Cooperation*, 13 Envtl. L. 841, 849-850 (1983) (Meek).

Economy energy is energy surplus to one utility's system which can be sold on the spot market to other utilities because the energy can be priced lower than the buyer's short-run marginal production cost. When this is surplus hydroelectric energy, it results in environmental benefits as well as economic ones because it displaces the use of fossil fuels and results in substantial savings to customers.

Finally, baseload power is used to supply ongoing needs of customers. Often a baseload power plant is located some distance from loads because of cost savings and environmental considerations. The result is that utilities in California alone obtain large portions of their electricity from utilities and agencies in Oregon, Montana, Washington, Idaho, Nevada, New Mexico and Arizona. Similarly, utilities in Oregon may obtain significant amounts of electricity from Washington, Idaho, Montana, Wyoming, Utah, and California.

It is only through an integrated interstate transmission network that this vast bulk power market can function. This market offers

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distance transmission. In the west this usually means 500 kilovolt (kV) lines, although for shorter distances, 230- and 115- kV lines are used. Lower voltage lines are used for distribution of power at the local level.

not only environmental benefits, but significant cost savings for consumers throughout the western United States.[3] Even though transmission lines are expensive, the power exchange transactions they make possible more than pay for their cost. This network also makes the systems it links more reliable, because if one source of power is suddenly unavailable due to a forced outage, another source can be made available to keep up with the demand. Thus, these cooperative arrangements result in a large, integrated electrical transmission system that has a number of significant advantages for the public:

—it accommodates seasonal peak demands and provides for relatively inexpensive exchanges of power;

—it promotes reliability by connecting many sources of power and minimizing the severity of any single plant or line failure;

—it provides for routing over direct pathways, thereby reducing losses and other costs to utilities and their customers; and

—it is an environmentally sound method of satisfying the public's need for reasonably priced electric power, which is essential to maintaining the quality of life in the United States.[4]

The Montana tax at issue in this case (and the precedent it will set for other states) poses a serious threat to the efficient bulk power market using this integrated transmission system, particularly those parts of it that are federally owned and operated. If, as Montana maintains, a mere service contract for transmitting

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[3] Other regions of the country have similar large scale bulk power markets and transmission networks.

[4] The alternatives to economical interstate transmission of power, including surplus hydroelectric energy, are highly undesirable. In California, for example, further development of intrastate hydroelectric resources would require the damming of the few remaining wild rivers and displacement of wildlife. Thermal power plants, on the other hand, are at least as difficult an alternative because of air quality and other environmental concerns.

power over federal lines provides a sufficient basis for a state to tax the "use" of such lines located in that state, the impact on amici and their millions of customers would be enormous. That impact would first be felt on the federal portion of the integrated transmission system. Then the taxes would affect the bulk power market dependent on those transmission lines, and finally the utilities in that market and their retail customers would feel the impact. In short, unfettered discriminatory taxation of one portion of the integrated system will have an inevitable ripple effect on other parts since, despite the diversity in the utility industry, all its constituent members, especially those doing business in the Pacific Northwest, "are interconnected physically by a transmission grid and institutionally by the region's large-scale wholesaler of electricity, the federal Bonneville Power Administration." Blumm, *The Northwest's Hydroelectric Heritage: Prologue To The Pacific Northwest Electric Power Planning And Conservation Act*, 58 Wash. L. Rev. 175, 178 (1983).

While the case before the Court involves only a single transmission service contract, there are literally scores of contracts presently in force between amici and out-of-state utilities for the purchase, sale and exchange of power across federally owned and operated power lines. A summary of these contractual arrangements, as well as other interstate purchase, sale and exchange contracts, is appended to this brief as Appendix C. These types of contracts form the heart of the interstate bulk power market in the west, without which customers in many states would be denied the enormous benefits of efficient exchanges. This Court has previously recognized the reality of and the need for such interstate power sharing contracts [*see, Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 381 (1983); *FERC v. Mississippi*, 456 U.S. 742, 757 (1982)], and has pointed out that unreasonable state restrictions on the free interchange of electricity have long been a matter of federal concern. *E.g., New England Power Co. v. New Hampshire*, 455 U.S. 331, 340-344 (1982). Indeed, as this Court stated in *FERC v. Mississippi, supra*, 456 U.S. at 757: "[it is] difficult to conceive of a more basic element of interstate commerce than electrical energy, a product used in virtually every home and every commercial or manufacturing

facility. No State relies solely on its own resources in this respect."

Moreover, to the extent that this "beneficial use" tax is added to the contractual charges for transmission service and power that the utilities already pay, it will either make otherwise advantageous transactions infeasible or will increase the costs of electric power to consumers.[5] By allowing Montana and other states to construct a wall of higher costs for bulk power transactions, then, both reliability and overall market efficiency will suffer. And to the extent the costs of purchased power are passed through to consumers, the higher costs of essential services like heating and lighting will cause dislocation and hardship.[6] To the extent utilities will have to look elsewhere for power, the undesirable consequences will be just as great, in the form of greater environmental harm and large but inefficient capital expenditures for new generating plants.

The adverse impacts of the costs imposed by taxes like Montana's, with its potential for proliferation, are not limited to the existing transmission system. The strengthening and growth of this sytem, in response to new opportunities in the bulk power market, will also be damaged. An example is the construction of a third 500-kV line between California and the Pacific Northwest which is expected to be completed in 1992. Called the California-Oregon Transmission Project, this line, which is 342-miles long in California alone, will add 1,600 megawatts of transmission capac-

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[5] The rates for transmission service by federal power marketing agencies are set within the Department of Energy and approved by the Federal Energy Regulatory Commission. 42 U.S.C. § 7172(a)(1)(B); 16 U.S.C. § 839e; *Pacific Power And Light Co. v. Duncan*, 499 F.Supp. 672 (D. Ore. 1980). To the extent the Montana tax imposes a surcharge on these federally-established rates, it is an unlawful intrusion on the exclusive authority of the Department and the Commission to set these rates, in violation of the Supremacy Clause. *See, Mississippi Power v. Moore*, ____ U.S. ____, 101 L. Ed. 2d 322, 340-342 (1988).

[6] These costs will fall most harshly on the elderly and the indigent. Businesses with power-intensive manufacturing processes will also be especially hard hit.

ity, enough in itself to carry all the power needs of a city the size of Seattle. This new line will expand the ability of the two regions to carry out seasonal exchanges and permit use of even more surplus (economy) energy.[7] However, the California portion of this new line will connect with federally owned lines in the Pacific Northwest, and its use will involve transmission service provided by the BPA. If the prospect of multiple taxation on the "beneficial users" of this new project is realized, then the benefits of this project, and even its viability, could be threatened since use of the new line, like the Pacific Intertie it augments, is governed by numerous contractual arrangements. *See*, Appendix C; Meek, *supra*, 13 Envtl. L. at 860.

Taxation of each of these transmission service contracts by every state along the route of the affected federal power lines, as is possible on Montana's theory of this case, is troubling to say the least. Montana's efforts to raise tax revenue from such "beneficial use" taxes accordingly comes at the direct expense of those who reside elsewhere and who rely on federal agencies for transmission of power interstate over federally owned lines.

II

MONTANA'S BENEFICIAL USE TAX PLAINLY VIOLATES THE ANTI-DISCRIMINATION PROVISIONS OF 15 U.S.C. SECTION 391

The transmission of electricity is governed not by the particular voltage that a transmission line can carry, but by the laws of physics. In an integrated, non-dedicated system, once electricity is generated and thereafter transmitted, the market where any particular watt of electricity will end up cannot be determined.

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[7] This project is noteworthy because it is being undertaken jointly by 17 California public and investor-owned utilities and agencies, including the federal Western Area Power Administration, which collectively serve a large majority of the electric power needs in California. Amicus Curiae Transmission Agency of Northern California, which manages the project, is now acquiring rights of way for the new power line and has issued and sold $60 million of revenue anticipation notes to finance the initial stages of the project.

Electricity follows the path of least resistance along transmission lines in any direction with no regard for a particular destination.

While any voltage electric line can be used to transmit power intrastate or interstate without distinction, generally high-voltage, high-capacity transmission lines (like the 500-kV lines that are the target of Montana's taxation statute) are used to transmit power over long distances because their carrying capacity is greater. In contrast, lines of 230-kV and below are most often used in regional transmission. Thus, any tax on transmission that is levied solely on high-capacity, high-voltage lines will of necessity have a disparate impact on the transmission of power interstate.

That fact was not lost on the Legislature of Montana when it purported to tax the "beneficial use" only of 500-kV electrical transmission lines within the state and exempted any transmission lines within the state of design capacity less than 500-kV even if such lines received power from a 500-kV line. *E.g.*, Mont. Code Ann. §§ 15-6-135, 15-6-141, 15-24-1203. Both the net effect and the intent of this statutory scheme are discriminatory. (Pet. for Certiorari, Case No. 89-266 at 16-18, 21-22) Portland General Electric and other out-of-state public and private utilities which receive power transmitted over 500-kV lines from Montana pay this tax while local residents whose power is also transmitted by BPA over lower voltage lines pay no tax at all. (*Id.*) While the activity remains the same—the transmission of electric power—Montana's tax falls more heavily on the interstate transmission of power and creates a burden on those who receive that power that is not shouldered by local residents.

This type of discrimination, directed as it is at the interstate transmission of power, is precisely what Congress sought to prevent with the passage of 15 U.S.C. Section 391. U.S. Code Cong. & Admin. News, 94th Cong., 2d Sess. 1976, Vol. 4 at 3866 (Jan.-Oct. 1976). In Section 391 Congress broadly and unambiguously prohibited discrimination in the generation and transmission of electricity in interstate commerce without regard to the capacity of the transmission line. According to the final committee report:

> The Senate's amendment prohibits any State or political subdivision of a State from directly or indirectly imposing any tax on the generation or transmission of electricity which discriminates against out-of-state users. This provision is effective for taxable years beginning after June 30, 1974. *Id.* at 4206.

Consistent with Congress' intent to prohibit all forms of tax discrimination relating to the interstate transmission of electrical power, 15 U.S.C. Section 391 provides that:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.[8]

It is difficult to conceive of a situation that more directly conflicts with the express terms or the spirit of this statute than the Montana beneficial use tax at issue here. Despite the state's argument to the contrary, there can be no legitimate dispute that the tax "either directly or indirectly" inflicts a greater tax burden "on or with respect to" electricity that is "generated and transmitted in interstate commerce" than on electricity that is generated and transmitted in intrastate commerce. Interstate transmission of power is expressly singled out by the Montana taxation scheme,

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[8] One of the discriminatory taxation schemes Congress sought to prevent was struck down by this Court in *Arizona Public Services Co. v. Snead*, 441 U.S. 141 (1979). U.S. Code Cong. & Admin. News, 94th Cong., 2d Sess. 1976, Vol. 4 at 3865 (Jan.-Oct. 1976). As the final Senate Committee Report reflects, however, this was but "an example of discriminatory state taxation which is properly within the ability of Congress to prohibit through its power to regulate interstate commerce." *Id.* at 3866. Thus, Congress selected the broadest possible language for its anti-discrimination provision. *Cf., Aloha Airlines v. Director Of Taxation*, 464 U.S. 7, 12-14 (1983).

much of the intrastate transmission of power is expressly exempted from it, and the tax directly falls on out-of-state wholesalers, retailers and consumers of electrical power transmitted in interstate commerce.

Describing the tax as one that is levied on the "contractual right" to use a transmission line, as Montana purports to do, does not avoid Section 391's proscription. The statute expressly makes generation *and* transmission subject to its reach, and when the power here is being transmitted through the BPA's line it is indisputably being transmitted in interstate commerce. At a minimum, the tax indirectly falls on power transmitted in interstate commerce. And more pragmatically, the tax is a direct tax "on or with respect to" transmission since once the power leaves the generating facility the "use" to which the line is being put, by contractual right or otherwise, is nothing more than the transmission of power over the line. Accordingly, Montana's efforts to characterize the tax as on or with respect to something other than transmission is a subterfuge to avoid the congressional purpose in enacting Section 391.

Montana's claim that all 500-kV transmission within the state and out of it are treated the same also does not place its discriminatory tax beyond the reach of Section 391. The statute expressly prohibits discrimination—direct or indirect—in *any* form, in *any* amount and at *any* level of electric power transmission. Accordingly, any burden shouldered by power transmitted in interstate commerce that is not shouldered by all power transmitted locally gives rise to prohibited discrimination. *Arizona Public Service Co. v. Snead, supra,* 441 U.S. at 146. The state must tax everyone transmitting or receiving power equally or not tax anyone at all. *Id.* at 150-151; *compare, e.g., Duquense Light Co. v. State Tax Dept.,* 327 S.E.2d 683 (1984), *cert. denied,* 471 U.S. 1029 (1985). As the Nevada Supreme Court opined in invalidating a state tax on the receipt of electric power:

> The specific subject matter of the quoted federal statute [15 U.S.C. Section 391] is the discriminatory taxation of the generation or transmission of electricity. Although paragraph two of our amended statutes purports to tax only the value of the right to receive electricity, the difference is one without a

> distinction. Nevada's tax directly impacts on the transmission of electricity to Cities, who in turn, must increase the cost of electrical power to their resident-consumers. Under § 391 such an impact would be permissible providing the resident-consumers of Nevada were subject to the same burden. They are not.
>
> We reject the notion that Nevada's citizens are taxed in different forms thereby compensating for the added tax burden imposed by paragraph two on Cities. This contention is unsound simply because § 391 eliminates its availability. Regardless of a given state's choice of taxing and alternatives, the United States Congress has clearly foreclosed the right of states to directly or indirectly yoke the generation and transmission of electricity with an unequal burden. [Citation.]

State of Nevada v. City of Burbank, 100 Nev. 598, 691 P.2d 845, 848 (1984).

If Montana's efforts to avoid the statute are successful, Section 391 will become a meaningless piece of legislation. If the transmission of power can be relabeled a contractual right to use a federally owned line and then taxed in a discriminatory manner, virtually all such interstate transmissions will be open to such discriminatory taxation because such transmissions are invariably accomplished by transmission service contracts like the one involved here. Further, if a state can legitimately single out 500-kV lines for discriminatory treatment, then high-capacity interstate transmission will feel the brunt of special property taxes in each state through which those lines pass. This is the precise result Congress sought to avoid, and the result that amici curiae are most concerned about.

Where the language of a statute is clear, there is no room for further "interpretation" and courts must give effect to its plain meaning. *E.g., Howe v. Smith*, 452 U.S. 473, 483 (1981); *Consumer Product Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102, 108 (1980). This Court has previously resorted to the plain language of Section 391 to head off an even less threatening discriminatory taxation practice than the one involved here [*Ari-*

zona Public Service Co. v. Snead, supra, 441 U.S. 141] and, in keeping with the plain meaning of the statute, the outcome here must be the same. *See, Burlington No. R. Co. v. Okla. Tax Com'n*, 481 U.S. 454, 461 (1987); *Aloha Airlines v. Director Of Taxation, supra*, 464 U.S. at 12-14. Unless this Court sends a firm message that Section 391 means what it says, state legislatures will continue to use beneficial use taxes as a means to discriminate against the interstate transmission of electric power and thereby to defeat the congressional purpose in enacting the statute.[9]

III

MONTANA'S BENEFICIAL USE TAX VIOLATES THE SUPREMACY CLAUSE

The discriminatory impact of Montana's beneficial use tax not only runs afoul of Section 391's demand for equality of treatment for those who receive interstate transmissions on federally owned lines, it also violates the Supremacy Clause [U.S. Const. art. VI, cl. 2] for the same reason.

The Supremacy Clause is not avoided, as Montana contends, simply because the tax falls on a private interest (like PGE's contractual right) as opposed to a federal instrumentality (like the BPA's transmission line). Nor is that the distinction that this Court "validated" in cases like *United States v. County Of Fresno, supra*, 429 U.S. 452. Rather, the taxes on privately held possessory interests like the one involved in *County Of Fresno*, survived scrutiny under the Supremacy Clause because they were imposed in a nondiscriminatory manner so as to equalize the tax burdens between those who used federally exempt property within a state

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[9] Applying Section 391 as Congress intended creates no insuperable burden for Montana. The state already taxes the withdrawal of the coal that fires the Colstrip plant. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). The state also imposes a property tax on the Colstrip plant itself. The only tax that Montana will not be permitted to levy by virtue of applying Section 391 is its discrete tax on electrical transmission—the precise sort of tax that Congress expressly intended to foreclose.

and those who used similar, but non-exempt property, within the state. *See, e.g., Washington v. United States*, 460 U.S. 536, 542-547 (1983); *Memphis Bank & Trust Co. v. Garner*, 452 U.S. 392, 397-398 (1983).

Through the imposition of its beneficial use tax, however, Montana is not making any nondiscriminatory effort to "equalize" a disparity that exists between those who use federally exempt property within Montana and those who do not. *Compare, e.g., United States v. City Of Detroit*, 355 U.S. 466, 473-474 (1958). On the contrary, Montana's tax is intended to and does create an *additional burden* on those out-of-state who contract with the federal government for transmission service that is not borne by all those within the state who contract with the federal government for the same service. No possessory interest or beneficial use tax case decided by this Court can possibly be relied upon to justify a greater tax burden of this character imposed on those who deal with the federal government. Since *McCulloch v. Maryland*, 4 Wheat 316, 4 L.Ed. 579 (1819), this Court has consistently stated that that sort of blatant discrimination against those who deal with the federal government violates the Supremacy Clause. *See, United States v. County Of Fresno, supra*, 429 U.S. at 462; *and see, Washington v. United States, supra*, 460 U.S. at 542-543; *Memphis Bank & Trust Co. v. Garner, supra*, 459 U.S. at 397.

IV

MONTANA'S BENEFICIAL USE TAX VIOLATES THE INTERSTATE COMMERCE CLAUSE

In evaluating the validity of any state property tax under the Interstate Commerce Clause [U.S. Const. art. I, sec. 8, cl.3], this Court has always looked beyond the state's description of the challenged tax to determine its "practical effect" on interstate commerce. *Mobil Oil Corp. v. Commissioner Of Taxes*, 445 U.S. 425, 443 (1980); *accord, Nippert v. Richmond*, 327 U.S. 416, 431 (1946). If the practical operation of the tax discriminates against interstate commerce, this Court has never hesitated to invalidate it. *E.g., Maryland v. Louisiana*, 451 U.S. 725, 754-756, 759

(1981). Thus, while the commerce clause does not prohibit taxes levied on interstate commerce per se, the clause does provide a substantive guarantee that the taxation of intrastate and interstate commerce will be kept on an equal plane. *American Trucking Assn. Inc. v. Schneiner*, 483 U.S. 226, 280 (1987); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 403 (1984); *Phillips Chemical Co. v. Dumas School Dist.*, 361 U.S. 376, 383 (1960).[10] A state "may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984).

In making its practical assessment of a tax's discriminatory impact, this Court has looked to four factors to determine whether a property tax will withstand constitutional scrutiny under the commerce clause:

> —Whether the tax is applied to an activity that has substantial nexus with the taxing state;
>
> —Whether the tax is fairly apportioned to activities carried on by the taxpayer in that state.
>
> —Whether the tax discriminates against interstate commerce; and
>
> —Whether the tax is fairly related to services provided by the taxing state.

See, e.g., Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 277-279 (1977); *and see, Commonwealth Edison Co. v. Montana, supra*, 453 U.S. at 617.

Moreover, this Court has also emphasized that the discriminatory character of a tax cannot be eliminated simply because interstate and intrastate taxpayers, who appear to be similarly situated, pay the same tax. "[A] tax must have 'what might be called internal consistency—that is the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible

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[10] The volume of in-state business favored or the volume of the interstate business disfavored is irrelevant to this discrimination analysis. *New Energy Co. v. Limbach*, 486 U.S. 269, 100 L.Ed. 2d 302, 310 (1988); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268-270 (1984).

interference with free trade." *Armco, Inc. v. Hardesty, supra*, 467 U.S. at 644-656 (*quoting Container Corp. Of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983)); *accord, American Trucking Assn. Inc. v. Schneiner, supra*, 483 U.S. at 284; *Tyler Pipe Ind. v. Dept. Of Revenue*, 483 U.S. 232, 243-248 (1987).

Montana's beneficial use tax fails to withstand scrutiny under the factors identified in *Complete Auto Transit* or under the internal consistency test articulated in *Armco*. Montana's beneficial use tax accordingly must be held unconstitutional under the Interstate Commerce Clause.

1. The Out-Of-State Utilities And Their Customers Who Are Subject To The Beneficial Use Tax Have No Legitimate Nexus To Montana For Purposes Of That Tax

The discrete tax at issue here is imposed only on the contractual right to receive transmission services from the BPA. That contract creates no presence on the part of the Colstrip owners in Montana. It simply creates an intangible right to receive transmission services out-of-state that are undertaken and performed by a separate and independent entity (the BPA) in the state.

Yet, a direct connection with the taxing state, involving the purposeful availment of that state's benefits and protections, historically has been required for any real property tax to pass constitutional muster. *E.g., Norfolk & Western Ry. Co. v. Missouri Tax Com.*, 390 U.S. 317, 323-324 (1968); *and see, Exxon Corp. v. Wisconsin Dept. Of Revenue*, 447 U.S. 207, 219-220 (1980); *West Point Grocery Co. v. Opelika*, 354 U.S. 390, 391-392 (1957). That historic justification is absent, however, in a case involving nothing more than a mere contractual right to receive power transmitted interstate. For that purpose, the Colstrip owners have no office in Montana, no employees in Montana, no marketing efforts in Montana and no sales in Montana. In short, the Colstrip owners have no nexus with Montana that could conceivably support the imposition of any real property tax, no matter what its label, with respect to the contractual right to

receive transmission service from the BPA that Montana is attempting to tax here.[11]

2. There Can Be No Fair Apportionment Of Montana's Beneficial Use Tax To Interstate Commerce

This criterion, like the need for a sufficient nexus to impose a property tax, requires that the tax be fairly apportioned to the taxpayer's activities in the taxing state. *E.g., Moorman Manufacturing Co. v. Bair*, 437 U.S. 267, 276-277 (1978). For purposes of the tax here, however, there *are no* activities. The right to possess, own and operate the transmission lines, as well as the control of the transmission of power over them, all reside exclusively in the BPA which provides the transmission service. For this pur-

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[11] No case of which amici are aware has ever extended the concept of a beneficial use real property tax to private persons who, while they may gain a benefit from a contract with the federal government, do not thereby acquire the direct right to physically use or possess the government's tax exempt property within the taxing state's borders. *E.g., United States v. County Of Fresno, supra*, 429 U.S. 452 (possession and use of federal government owned housing within the state); *City Of Detroit v. Murray Corp.*, 355 U.S. 489 (1958) (use of machinery and property owned by the government within the state); *United States v. City Of Detroit, supra*, 355 U.S. 466 (use and occupancy of property within the state); *United States v. Township Of Muskegon*, 355 U.S. 484 (1958) (same). The transmission service contract here in no way involves an assignment of the right to use any federal property. The most that can be said of the contract is that it gives the utilities the right to obtain a certain amount of power transmitted by the BPA over transmission lines the BPA owns, maintains and controls. By attempting to equate the intangible contractual right to obtain a service with a "beneficial use of government property," Montana is not only abandoning any previously established basis for the assessment of a real property tax, but also creating a dangerous precedent. The federal government is certainly one of the largest providers of services in the United States and many of these services, like electrical power transmission, are interstate in character. It will be a short step from the taxation concept proposed by Montana here to a plethora of state "beneficial use taxes" on those recipients of interstate government services who are deemed to acquire a "sufficient nexus or presence" within the taxing state solely by receiving services that pass through it.

pose—transmission service—therefore, the activity in interstate commerce is paying more than its fair share of the tax burden.[12] This is simply a form of discriminatory taxation that subjects out-of-state businesses and their customers to a tax not shouldered by local residents. Thus, while Montana purports to have a fair formula for allocating the tax, that begs the question. No tax can be fairly apportioned in the absence of any activity to which it can be apportioned. *See, Norfolk & Western Ry. Co. v. Missouri Tax Com., supra*, 390 U.S. at 325.

3. Montana's Beneficial Use Tax Discriminates Against Interstate Commerce

By limiting the tax to transmission lines of 500-kV and higher—high-capacity lines which transmit power interstate—Montana intended to inflict a disproportionate economic burden on those who receive electric power transmitted interstate. Intrastate customers who receive power off the very same line using 230-kV transmission are not subjected to the tax. Nor are intrastate customers who receive power over identical tax-exempt BPA lines at voltages lower than 500-kV. (Pet. for Certiorari in Case No. 89-266 at 16-18, 21-22)

The out-of-state residents in Oregon, Washington, California and elsewhere obviously are powerless to prevent the imposition of these discriminatory taxes. It is precisely this type of parochial taxation policy that should be subjected to the closest scrutiny under the commerce clause. *Cf., Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 330-336 (1977). The reasons are plain enough. Out-of-state residents cannot resort to the ballot box to ameliorate the effects of discriminatory taxes and therefore are inviting targets for the imposition of those taxes. Consequently, states like California, and more particularly the customers of the publicly and privately owned utilities involved here, will

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[12] To the extent that any burdens were created by the construction of the federal lines, those burdens already have been paid for. When the lines were constructed, Congress passed an accompanying impact tax which reimbursed all affected counties for any dislocation resulting from the placement of the lines. Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. § 839e(m) (1982).

subsidize the residents of Montana although they have neither sought nor obtained any benefit within the borders of Montana. Again, that result cannot survive constitutional scrutiny. *See*, pp. 12-13, *supra* (and cases cited therein); *and see, Boston Stock Exchange v. State Tax Comm'n, supra*, 429 U.S. at 329; *Halliburton Oil Well Cementing Co. v. Reily*, 273 U.S. 64, 72 (1963).

4. There Is No Fair Relationship Between Montana's Beneficial Use Tax On The Out-Of-State Utilities And Any Services Provided By The State

To withstand scrutiny under the commerce clause, a tax must also be reasonably related to the taxpayer's activities within the state imposing the tax. Thus, those who take advantage of a state's police and fire protection or other resources can be taxed in order to pay their fair share of those services as a result of their presence and activities within the state. *Commonwealth Edison Co. v. Montana, supra*, 453 U.S. at 626; *see, Portland Cement Co. v. Minnesota*, 358 U.S. 450, 464-465 (1959).

The Colstrip owners, however, already pay taxes for their presence in the state. They have no presence at all for purposes of the beneficial use tax imposed on the transmission of electricity over federal power lines. The only presence in Montana for that purpose is, as noted, exclusively federal: the BPA owns, operates and uses the lines and it also controls the transmission over them. The utilities involved, including PGE, merely receive the transmitted power outside the state. For that purpose, the utilities do not exercise any property or other rights within Montana and Montana provides the utilities with no police, fire protection or any other service that relates to the bare contractual right to receive the power.

5. Montana's Beneficial Use Tax Lacks Internal Consistency

To avoid creating an unlawful burden on interstate commerce, a property tax must also be imbued with internal consistency. That is "the tax must be such that, if applied by every jurisdiction, there would be no impermissible interference with trade." *See*, pp. 13-14, *supra* (and cases cited therein). A state-imposed property tax that conceptually could be relied upon by other states to impose multiple burdens on those who do business in interstate

commerce constitutes invidious discrimination because it creates the potential to interrupt the flow of free trade. *Id.; also see, Michigan-Wisconsin P.L. Co. v. Calvert*, 347 U.S. 157, 166-167 (1954). Yet, that would be precisely the pernicious effect of sanctioning Montana's beneficial use tax here.

The pretext for the tax is simply the presence of a 500-kV federally owned power line in the state and a transmission services contract that entitles a utility to receive power over the line when its needs may require. That condition exists in every state in the integrated system that cooperatively promotes the exchange of surplus electrical power. Every one of these states could impose such a tax thereby creating an onerous burden on the free flow of electrical power. This Court has never condoned that level of adverse impact on the distribution of goods in interstate commerce and, given the public's demonstrable need for inexpensive sources of electrical power, it should not do so here.

V

MONTANA'S BENEFICIAL USE TAX VIOLATES THE FOURTEENTH AMENDMENT

By virtue of its discriminatory impact on those who receive transmission of power interstate, Montana's beneficial use tax also violates the equal protection and due process clauses of the Fourteenth Amendment. While Montana claims that its tax is not discriminatory because all those who receive power over 500-kV lines are taxed in a similar manner in Montana, that classification is illusory. There is no distinction among the generators and transmitters of electrical power no matter what voltage is used and no logical way to determine who is using any particular voltage line and what electricity at any particular time. The classification here, by design and in practice, discriminates against those who receive electrical power through interstate transmission service while those who receive that same service intrastate, by design and in practice, escape any tax burden.

A tax differential directly burdening interstate commerce is a due process and equal protection violation of the most basic sort. *E.g., Exxon Corp. v. Wisconsin Dept. Of Revenue, supra,* 447

U.S. at 219-220; *Phillips Chemical Co. v. Dumas School Dist., supra,* 361 U.S. at 384-387. The discriminatory aspect of the beneficial use tax—imposed as it is on a bare intangible contractual right for transmission service to an out-of-state recipient for which there is no presence in Montana—is not rationally related to any legitimate state purpose. *Cf., Williams v. Vermont,* 472 U.S. 14, 23-27 (1985); *compare, e.g., Moorman Mfg. Co. v. Bair, supra,* 437 U.S. at 274; *Western & Southern Life Ins. Co. v. Bd. Of Equalization,* 451 U.S. 648, 668-674 (1981). Montana's attempt to impose this discriminatory extraterritorial tax on utilities which are disenfranchised within Montana and incapable of doing anything about it, is unlawful under the Fourteenth Amendment and should be condemned on this ground as well. *E.g., Metropolitan Life Ins. Co. v. Ward,* 470 U.S. 869, 878-882 (1985). *ASARCO, Inc. v. Idaho State Tax Com'n,* 458 U.S. 307, 315 (1982); *F. W. Woolworth Co. v. Taxation & Revenue Dept.,* 458 U.S. 354, 363-364 (1982).

VI

CONCLUSION

As this Court recognized more than forty years ago, where extraterritorial taxation is concerned "[t]here is no limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate or distinct' or 'local' and thus achieve its desired result." *Nippert v. Richmond, supra,* 327 U.S. at 423. Unless this Court acts to declare Montana's discriminatory tax unlawful, other states from which these amici receive power over federally owned transmission lines will most certainly follow suit with "beneficial use" taxes of their own. The public cannot afford that result and Congress and the Constitution will not permit it.

No one disputes that states can exact their fair share of tax revenue from those who do business within their borders. Montana's beneficial use tax, however, creates discrimination in violation of 15 U.S.C. Section 391, improperly burdens interstate commerce, and creates the kind of discrimination and favoritism that the due process and equal protection clause plainly forbid.

The use, transmission, interchange and allocation of electrical energy is a matter of nationwide concern. The integrated system that exists throughout the western, northwestern and southwestern United States hangs in a delicate balance and hinges on interstate contractual arrangements with both federal power agencies and public and private generators and transmitters of electrical power. These contracts are the precise target of Montana's tax and when similar beneficial use taxes are imposed by other states, the problems will be compounded.

Certiorari should be granted to review the erroneous decision of the Supreme Court of Montana.

DATED: September 8, 1989.

Respectfully submitted,

EZRA HENDON
(Counsel of Record)
JAMES C. MARTIN
CROSBY, HEAFEY, ROACH & MAY
Professional Corporation

By _____
EZRA HENDON
Attorneys for Amici Curiae

APPENDIX A

Stoel Rives Boley
Jones & Grey
[LETTERHEAD]

August 25, 1989

James C. Martin, Esq.
Crosby, Heafey, Roach & May
Attorneys at Law
1999 Harrison Street
Oakland, CA 94612-3573

Re: Consent to Filing of Amicus Brief

Dear Mr. Martin:

This is to advise you formally that Portland General Electric Company consents to your firm's filing of an amicus brief on behalf of various publicly and privately owned electric utilities regarding Portland General Electric Company's Petition for Issuance of Writ of Certiorari to the Montana Supreme Court in *Portland General Electric Company v. Montana Department of Revenue, et al.*, Supreme Court Docket No. 89-266.

Please let me know if you have any questions.

Very truly yours,

THOMAS H. NELSON
Thomas H. Nelson
Counsel of Record

APPENDIX B

State of Montana
[LETTERHEAD]

VIA FEDERAL EXPRESS

August 18, 1989

Thomas H. Nelson, Esq.
Stoel, Rives, Boley,
Jones & Grey
900 SW 5th Avenue
Suite 2300
Portland, OR 97204-1268

RE: Pacific Power and Light Company, et al, v. Department of Revenue, et al, Nos. ADV-86-069, ADV-87-081, and ADV-88-032

Dear Tom:

I have your letter dated August 14, 1989, concerning the beneficial use tax litigation in Montana. I attempted to contact Don Murray by telephone on several occasions concerning your request for an extension of time in which to file the post-trial findings and post-trial briefs in the third beneficial use tax case. I was unable to contact him.

* * *

The next matter raised in your letter dated August 14, 1989, is amicus curiae appearances by certain California utilities. Please be advised that I have no authority to accede to any amicus filings by such entities. I have no idea at this point what their interest in the litigation might be, and your letter dated August 14, 1989, sets forth no such explanation. Nor do I have the time to investigate what their interests and positions might be in this litigation. Very frankly, I view any intrusion by third parties into our litigation as being unnecessary. For that reason, I will not support or consent to any amicus curiae briefs in support of the petition for a writ of certiorari which the Colstrip owners have filed.

* * *

I hope that I have addressed the matters set forth in your letter dated August 14, 1989. If you have any questions, please call me.

Sincerely,

LARRY
Larry G. Schuster
Counsel

LGS:rk
lgs44q
cc: Mary Whittinghill
Donald R. Murray

APPENDIX C

SUMMARY OF CONTRACTUAL ARRANGEMENTS ENTERED INTO BY AMICI FOR THE INTERSTATE PURCHASE AND TRANSMISSION OF POWER

Amici have surveyed the number and value of the contracts they have entered into for the transmission of power across state lines, both utilizing federally-owned and operated facilities and using other facilities. This survey reflects the following:

Pacific Gas and Electric Company (PG&E) which is the largest investor-owned gas and electric utility in the United States, is the principal source of electric power for four million customers, serving an area of northern and central California with a population of more than ten million. PG&E has entered into contracts with three Pacific Northwest utilities to exchange 650 MW of power between 1991 and 2011 at an estimated value between $10 and $15 million per year. These exchanges rely on transmission service over federal lines.

In addition, PG&E buys large amounts of economy energy from the Northwest, pursuant to contracts with over a dozen utilities. In 1988, purchases from non-federal sellers which required transmission service from federal agencies totalled 2,837,978 kilowatt hours of energy, at a cost of over $65 million.

The Sacramento Municipal Utility District (SMUD) which supplies electric power to all of the greater Sacramento, California, area has entered into three long term power purchase contracts with Pacific Power and Light Co., located in Portland, Oregon, covering the period between 1990 and 2014. These contracts provide for the sale of 100 MW of power and the total value of the purchases is approximately $28 million per year. In addition, SMUD has contracted with other California companies for the transmission of power across interstate lines at an estimated cost of $670,000 per year and as a participant in the Transmission Agency of Northern California is entitled to receive 207 MW of power from a proposed 500-KV line on the Intertie system at a cost of $83 million.

The Los Angeles Department of Water and Power (LADWP), the largest municipally-owned utility in the United States, supplies the electric power needs for the City of Los Angeles. It has entered into numerous separate contracts for the purchase of power from out of state, including the following: eight contracts with separate utilities for specified amounts of power; enabling agreements with 25 out-of-state utilities or governmental agencies which specify no fixed amount, but under which transfers of energy could occur; an additional three contracts in which the amount of power purchased is a function of the capacities and operating characteristics of the particular plant. Los Angeles has nine separate transmission agreements for the receipt of interstate power. The great bulk of this power is transported across federally-owned facilities.

Los Angeles purchases capacity and energy from Bonneville Power Administration (BPA) and other Pacific Northwest utilities to be delivered over the Pacific DC Intertie +/− 1000 kV high-voltage DC line. These purchases are used by Los Angeles during on-peak hours in conjunction with other resources for economic system operation. In addition, purchases of economy energy are made from utilities in Nevada, Arizona, New Mexico and Colorado. LADWP's entitlement from the Hoover Power Plant in Nevada (491 MW) is considered a long term firm purchase. LADWP also purchases capacity from Utah Power & Light Company (64 MW) and from the Montana Power Company (105 MW).

Southern California Edison Company (SCE) which delivers electric power to 3.8 million customers in 15 central and southern California counties and 150 incorporated communities, has contracts with several utilities or governmental agencies for the purchase of power. These include Arizona Public Service Company, Pacific Power and Light Company, Portland General Electric Company, Washington Water Power, and the Bonneville Power Administration. In addition, SCE transmits power from three power plants located outside the State of California, which it owns. In total, these agreements account for the transmission of over 3,400 MW of power, utilizing the Pacific Intertie and other federally and publicly operated power lines.

San Diego Gas and Electric Company (SDG&E) which is responsible for the electric power needs of 1,030,000 customers has a contract for the purchase of 75 megawatts of power through the year 2013 with Petitioner Portland General Electric Company and a transmission service agreement on the northern section of the Pacific Intertie for transmission of 75 megawatts. Pursuant to a series of transmission agreements between Pacific Gas and Electric, Southern California Edison, Western Area Power Administration, SDG&E and various municipal utilities relating to the southern section of the Pacific Intertie, San Diego Gas and Electric Company has transmission rights for 269 megawatts of power supplied under the Portland General Electric Company contract and for surplus hydro-electric power which SDG&E purchases when it is available from various utilities in the northwest. SDG&E makes economy spot purchases and sales of power utilizing BPA lines, the Pacific Intertie and Western Area Power Administration lines.

Southern California Public Power Authority (SCPPA) is a joint powers agency created to finance the acquisition of generation and transmission projects on behalf of its members. The members of SCPPA are the California cities of Anaheim, Azusa, Banning, Burbank, Colton, Glendale, Pasadena, Riverside, Vernon, the Department of Water and Power of the City of Los Angeles (LADWP), and the Imperial Irrigation District.

SCPPA's transmission facilities in which its members have ownership or entitlement are as follows:

1. The Cities of Anaheim, Azusa, Banning, Colton, Riverside and Vernon are participants in the California-Oregon Transmission Project ("COTP"), have an entitlement of approximately 121 megawatts in the COTP.

2. LADWP, and the Cities of Burbank, Pasadena and Glendale, own 50 percent of the Pacific DC Intertie Transmission Line. Each of those utilities has a variety of contracts of purchase capacity and energy from BPA and other Pacific Northwest utilities for delivery over the DC transmission facilities. In addition, the Cities of Anaheim, Azusa, Banning, Colton and Riverside are preparing to enter into an

Agreement with the Cities of Burbank, Glendale and Pasadena to purchase transmission service for a term of 20 years over the DC transmission facilities. Anaheim, Azusa, Banning, Colton and Riverside contemplate entering into a 20 year agreement with BPA to purchase firm capacity and energy. Such capacity and energy will be delivered at the Nevada/Oregon border by BPA over its entitlement in the Pacific DC Intertie transmission lines

3. LADWP and the Cities of Anaheim, Burbank, Glendale, Pasadena and Riverside are participants in the Intermountain Power Project, a large coal-fired generating plant consisting of a 2,800 megawatt unit located in Delta, Utah. As a part of the Intermountain Power Project, these Cities are also participants in a DC transmission line running from the Intermountain Power Project in Delta, Utah through the states of Nevada and California and terminating at a switching station near Adelanto, California.

The Transmission Agency of Northern California (TANC) is a public entity of the State of California formed pursuant to California Government Code Sections 6500 *et seq.*, by which public entities may jointly exercise the powers they have in common.

The members of the TANC are the cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, the Modesto Irrigation District, the City of Palo Alto, the City of Redding, the City of Roseville, the Sacramento Municipal Utility District, the City of Santa Clara, the Turlock Irrigation District, the City of Ukiah, and its associate member, the Plumas-Sierra Rural Electric Cooperative, Inc. All of the members, except the cities of Biggs and Gridley, are participating through TANC in the development of the California-Oregon Transmission Project. Through COTP the members intend to contract for power from utilities in the Pacific Northwest.

Three of the members of TANC, through the M-S-R Public Power Agency, described below, are also entering into a 20-year agreement with BPA for electric power.

The M-S-R Public Power Agency was also formed pursuant to California Government Code Section 6500 *et seq.* in 1980, and is comprised of the cities of Santa Clara and Redding, and the Modesto Irrigation District.

In 1983 M-S-R acquired an interest in Unit Four of the San Juan Unit Four Electric Generating Station located in New Mexico, near the City of Farmington. This coal-fired plant is operated by the Public Service Company of New Mexico (PNM). Among its owners are PNM, Tucson Electric Power Company (TEP), the City of Farmington, the City and County of Los Alamos, and the Century Power Corporation. In that region M-S-R has entered into wholesale power contracts with a number of entities, one of which, an Interconnection Agreement between M-S-R and TEP, provides for the use of TEP's contract right to transfer power over the federal transmission lines of Western Area Power Administration.

The Northern California Power Agency (NCPA) has a membership which includes all of the members of TANC except for the Sacramento Municipal Utility District and the Modesto Irrigation District. It was organized to represent its members in the purchase, generation, distribution, interchange, pooling and sale of electricity. Each of NCPA's members owns and operates an electrical system to distribute electric power and energy for public and private use. Customers of NCPA's members range the gamut typical of electric users, including the federal government. For example, the City of Alameda supplies power to the Alameda Naval Air Station.

To supply its members' needs, NCPA built approximately 200 MW of electric generating capacity in 1983 in the Geysers Known Geothermal Resource Area in Sonoma and Lake Counties, California. The steam is a federal resource piped up wells from federal leaseholds held by NCPA. NCPA is awaiting the completion next year of the North Fork Stanislaus Hydroelectric Project, a water and power project licensed under the Federal Power Act to the Calaveras County Water District, from which NCPA and its members will have another approximately 200 MW of generating capacity. Additionally, NCPA is currently reviewing proposals for additional supplies to serve its member entities in the future,

including contracts for the purchase of wholesale power from the Pacific Northwest. NCPA also purchases power from sources as far away as Montana and sells surplus power. These purchases of power and sale of surplus power rely heavily on federally operated transmission lines.